Supreme Court, U.S.
FILED
971666 APR 10 1998
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1997

KEVIN E. BRYAN and RENEE M. BRYAN

Petitioners,

vs.

KENNETH M. CLAYTON and
NEAL McCULLOH, individually and d/b/a
CLAYTON & McCULLOH, a Florida general partnership

On Petition For Writ Of Certiorari To The
State Of Florida Fifth District Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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113 pp

QUESTION PRESENTED

Are third party collection agents exempt from having to comply with the federal Fair Debt Collection Practices Act ("FDCPA") prohibitions against overreaching, intimidation, misrepresentation, etc. when they are attempting to collect condominium and homeowner association dues and assessments and ancillary charges, or are such items "debts" under the FDCPA?

PARTIES TO THE PROCEEDINGS

Respondents, Kenneth M. Clayton and Neal McCulloh, individually and doing business as Clayton & McCulloh, a Florida general partnership (hereafter, collectively, "the law firm" or "Clayton"), were the appellees in the appellate proceedings below. Kevin E. Bryan and Renee M. Bryan, his wife (hereafter, "the homeowners" or "the Bryans"), were the appellants. Amber Ridge Homeowner's Association, Inc. (hereafter "Amber Ridge") was a defendant in the trial court, but the claims against Amber Ridge were not involved in the appellate proceedings below. Accordingly, Amber Ridge did not participate in the appellate proceedings below, nor is it a participant herein.

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PETITION FOR WRIT OF CERTIORARI

Kevin E. Bryan and Renee M. Bryan, his wife, respectfully petition for a writ of certiorari to review the judgment of the State of Florida Fifth District Court of Appeal in this case.

OPINIONS BELOW

The trial court's order of May 7, 1996 [APX. 7] granting summary judgment to the law firm, and its final judgment filed July 29, 1996 in favor of the law firm [APX. 14], are unreported. The Florida Fifth District Court of Appeal opinion of May 9, 1997 affirming the trial court [APX. 1], and its opinion of September 12, 1997 denying a stay of its mandate [APX. 3], are reported at 698 So.2d 1236. Its order of May 12, 1997 provisionally awarding attorney's fees to the law firm, and its findings of fact in connection therewith [APX. 5], are unreported, as is its order of June 25, 1997 denying the homeowners' motion for clarification, rehearing, rehearing *en banc*, certification, and for ancillary relief [APX. 17]. Similarly, the Florida Supreme Court's order of January 28, 1998 denying the homeowners' petition for discretionary review and granting the law firm's motion for attorney's fees [APX. 18] is unreported.

JURISDICTIC

As noted above, the Florida Fifth District Court of Appeal affirmed the trial court on May 9, 1997 [APX. 1]

and thereafter denied the homeowners' motion for clarification, rehearing, rehearing *en banc*, certification, and for ancillary relief on June 25, 1997 [APX. 17]. Before the mandate issued, however, the United States Seventh Circuit Court of Appeals issued a squarely contrary opinion in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F. 3d 477 (7th Cir. 1997) on July 2, 1997 [APX. 64], whereupon the homeowners timely moved to stay or recall the mandate by reason thereof. Ultimately, this motion was denied in a reported opinion entered on September 12, 1997 [APX. 3], in which the court expressly disagreed with and declined to follow *Newman*. The homeowners timely petitioned the Florida Supreme Court to invoke its discretionary jurisdiction for review thereof, but the petition was denied by order dated January 28, 1998 [APX. 18]. The instant petition for writ of certiorari has been timely filed within 90 days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The stated purpose of the FDCPA is :

> [T]o eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692(e). [APX. 56] The homeowners' complaint alleged multiple violations of the FDCPA, namely, 15 U.S.C. §§ 1692e(2),(5),(10) [APX. 58]; 1692f(1) [APX.

59]; and 1692g(a),(b). [APX. 60] Additional pertinent statutory provisions included in the appendix at APX. 56 *et seq.* are 15 U.S.C. §§ 1692; 1692a(1)-(5); 1692a6(F) as relevant to this petition; 11 U.S.C. § 101(8); and 15 U.S.C. §§ 1601(a); 1602(a), (d)-(f), (h). The statutory provisions most relevant to this petition are the following definitions:

> As used in [the FDCPA] –
>
> . . .
>
> (3) The term 'consumer' means ***any*** natural person obligated or allegedly obligated to pay ***any*** debt.
>
> (4) The term 'creditor' means ***any*** person who offers or extends credit creating a debt ***or*** to whom a debt is owed. . . . .
>
> (5) The term 'debt' means ***any*** obligation or alleged obligation of a consumer to pay money arising out of a ***transaction*** in which the money, property, insurance, or services which are the subject of the transaction are primarily for ***personal, family, or household purposes***, whether or not such obligation has been reduced to judgment. [emphasis added.]

15 U.S.C. § 1692a(3),(4),(5). [APX. 57] Similarly, the Bankruptcy Code, 11 U.S.C. § 101(8), provides that for purposes of the Bankruptcy Code, " 'consumer debt' means debt incurred by an individual primarily for a personal, family, or household purpose[.]" [APX. 61] The Truth-In-Lending Act defines "consumer" somewhat more narrowly, as follows:

> [h] The adjective 'consumer', ***used with reference to a credit transaction***, characterizes the transaction as one in which the party ***to whom credit is offered or extended*** is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family or household purposes. [emphasis added].

15 U.S.C. § 1602(h). [APX. 62]

Finally, under 15 U.S.C. § 1692i(a)(1), the FDCPA regulates not only debt collection efforts directed against personal property, but also debt collection efforts directed against real property.

> Any debt collector who brings any legal action on a debt against any consumer shall –
>
> (1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located[.]

Id.

STATEMENT OF THE CASE

As reflected below, the homeowners' right to a cause of action under the federal statute was asserted *ab initio* and has been asserted continuously throughout these proceedings.

In August 1995, the homeowners sued the law firm in state court, asserting in the complaint fifteen separate violations of the FDCPA by the law firm in its attempts to

collect homeowner association dues and ancillary charges, such as attorney's fees, in connection therewith from the homeowners. The complaint and exhibits thereto are reproduced in the appendix beginning at APX. 20; the FDCPA is invoked therein at APX. 22, ¶ 13; the operative facts discussed below are all set forth in the complaint or the exhibits thereto; the specific violations of the FDCPA resulting from those facts, together with the citations to the specific statutory sections contended to have been violated, are set forth in ¶¶ 57(a)-(o) of the complaint, beginning at APX. 29; and the exhibits to the complaint begin at APX. 38.

As elaborated upon in the complaint, the law firm: in a December 1, 1994 demand letter, gave the homeowners fourteen days to pay the sum of $505.07 by cashier's check; threatened a lien and foreclosure if not timely paid; furnished the homeowners the FDCPA notice of their right to dispute and seek verification of the alleged debt [APX. 41, Exhibit A to complaint]; caused the homeowners thereby to promptly send a cashier's check for the $505.07, together with a written request for an itemization of how the amount was derived [APX. 42, Exhibit B to complaint]; returned the homeowners' check some 49 days later, claiming, without specificity, that the homeowners had failed to comply with their December 1 demand letter, and further claiming that some larger, unspecified, changing daily amount was now owed [APX. 43, Exhibit C to complaint]; responded in a February 2, 1995 telephone inquiry that the new balance owed was now $991.54, the increase from $505.07 being primarily attributable to purported additional attorney's fees [APX. 26, complaint ¶ 40]; never furnished a verification of debt

until a statement dated March 3, 1995 [APX. 49, Exhibit E to complaint] – which contended the balance due had risen to $1,196.56 as of February 4, 1995, including "$836.26 for cost, collection charges and attorney's fees" *Id.*; and claimed by a separate letter, also dated March 3, 1995, that $1,199.80 would be the total due as of March 16, 1995 – including a "lien charge" of $125, a "wind-up charge" of $155, attorney's fees of $556.26, and interest through February 1995. [APX. 51, Exhibit F to complaint] (The sum of $125 + $155 + $556.26 equals the $836.26 mentioned in the above-referenced March 3 verification of debt statement.)

These charges and fees were demanded even though: (a) the homeowners had tendered full payment as demanded back on December 8, 1994; (b) no lien had been recorded as of March 3, 1995, nor ever was until June 21, 1995 [APX. 53, Exhibit G to complaint]; and (c) the homeowners had still never been furnished an explanation of how the initial $505.07 demand was derived, much less any explanation of why it had escalated to $1,199.80 since they had timely done exactly as they were told. [APX. 25, Complaint ¶¶ 32, 33, 39-42, 48, 51] Even when the complaint was filed on or about August 8, 1995, some eight months after the original demand letter for the $505.07, the law firm had still never furnished the homeowners a verification of debt statement explaining how the $505.07 originally demanded had been determined. [APX. 31, Complaint ¶ 57(o)]

Even though the law firm had furnished the homeowners with the FDCPA notice as an attachment to the law firm's original December 1, 1994 demand letter [APX.

40, final paragraph, and APX. 41-42, Exhibit A to complaint], the law firm ultimately asserted to the trial court that based upon a series of rulings by various federal district courts in New Jersey, Illinois, Florida, and Virginia, the FDCPA does not apply to independent collection agents' attempts to collect dues and assessments for homeowner associations and condominium associations (hereafter, collectively "community associations"). The trial court agreed with the law firm [APX. 7], as did the Florida Fifth District Court of Appeal [APX. 1] – even after the first federal circuit court opinion squarely on point (*Newman, infra* [APX. 64]), held to the contrary.

REASONS FOR GRANTING THE PETITION

I. Review Is Necessary Because A Florida State Court Of Last Resort Has Decided A Federal Question In A Way That Expressly Conflicts With A Decision Of The United States Seventh Circuit Court Of Appeals, Namely, *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997).

The reason this Court should accept jurisdiction and grant this petition was best expressed, succinctly, in the most recent of the roughly half-dozen federal district court cases to expressly rule on the question presented herein, *Thies v. Wyman*, 969 F. Supp. 604 (S.D. Cal. 1997):

> There is considerable confusion and conflict in the federal courts as to what a 'transaction' is for the purposes of this statute.

Thies, 969 F. Supp. at 606. [APX. 74 at 77]. *Thies* chose to follow *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d

477 (7th Cir. 1997), which held, essentially, that in determining the scope (and limits) of the FDCPA, the words "any", "debt", and "transaction" in the FDCPA definitions should be given their plain and ordinary meanings.

In so holding, *Newman* joined two other recent panel decisions from the seventh circuit, *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1326 (7th Cir. 1997) and *Ryan v. Wexler & Wexler*, 113 F.3d 91, 93 (7th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 298, 139 L.Ed.2d 229 (1997), which had rejected the *dictum* or alternative holding in *Zimmerman v. HBO Affiliates Group*, 834 F.2d 1163 (3d Cir. 1987) (involving collection efforts for damages for theft of HBO signals), that as a subchapter of the Consumer Credit Protection Act, the FDCPA implicitly required "transactions" to have arisen from an extension of credit in order to be regulated under the FDCPA. Prior to this trilogy of seventh circuit decisions, this proposition of *Zimmerman* appeared to enjoy unchallenged acceptance among the nation's judiciary. Subsequently, however, the ninth and eleventh circuits have followed the seventh circuit trilogy and rejected *Zimmerman* to the extent it purports to stand for any more than the proposition that torts (*e.g.*, theft) are not "transactions". *See Charles v. Lundgren & Associates, P.C.*, 119 F.3d 739 (9th Cir. 1997), *cert. denied sub. nom., Checkrite Ltd. v. Charles*, ___ U.S. ___,118 S.Ct. 627, 139 L.Ed.2d 607 (1997) and *Brown v. Budget Rent-A-Car Systems, Inc.*, 119 F.3d 922 (11th Cir. 1997). On the other hand, neither *Charles* nor *Brown* (nor *Zimmerman*) involves a community association.

To date, *Newman* is the first federal appellate court (and only the second appellate court anywhere, *Bryan*

being the first) to expressly construe the FDCPA in the context of dues and assessments for community associations. Prior to *Newman*, the federal district courts were ruling uniformly in favor of the collection agents for the community associations, and against the individual owners. They did so on one or more of the following bases: (a) they adopted the *Zimmerman* "extension of credit" rationale, coupled with the assumption that association dues are generally paid in advance, not in arrears[1]; or (b) they perceived community associations to be analogous to mini-governments, hence, dues and assessments to be analogous to taxes; and therefore, citing the Third Circuit Court of Appeal decision in *Staub v. Harris*, 626 F.2d 275 (3d Cir. 1980) (per capita taxes for prisons, roads, defense, etc., are not "debts" under the FDCPA), they concluded that community association dues are also in a different league than FDCPA "debts"[2]; or (c), in the case of *Nance v. Petty, Livingston, Dawson, & Devening*, 881 F. Supp. 223 (W.D. Va. 1994), cited with

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[1] *See Riter v. Moss & Bloomberg, Ltd.*, 932 F. Supp. 210 (N.D. Ill. 1996); *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla.), *aff'd without opinion*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*,___ U.S. ___, 116 S.Ct. 712, 133 L.Ed.2d 666 (1996); *Vosatka v. Wolin-Levin, Inc.*, No. 94-C-4129, 1995 WL 443950 (N.D. Ill. July 21, 1995); *Archer v. Beasley*, No. 90-2576 (CSF), 1991 WL 34889 (D.N.J. March 5, 1991).

[2] *See Riter v. Moss & Bloomberg, Ltd.*, 932 F. Supp. 210 (N.D. Ill. 1996); *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla.), *aff'd without opinion*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*,___ U.S. ___, 116 S.Ct. 712, 133 L.Ed.2d 666 (1996); *Vosatka v. Wolin-Levin, Inc.*, No. 94-C-4129, 1995 WL 443950 (N.D. Ill. July 21, 1995); *contra, Archer v. Beasley*, No. 90-2576 (CSF), 1991 WL 34889 (D.N.J. March 5, 1991).

approval in *Bryan*, the court inexplicably relied on *Mabe v. G.C. Services, Ltd.*, 32 F.3d 86, 88 (4th Cir. 1994) (past due child support is not a "debt" under the FDCPA) to conclude that an assessment to repair a private road to one's subdivision is not a "debt" under the FDCPA.

After rejecting *Zimmerman*, the *Newman* court attacked the mini-government analysis in *Staub*:

> We have concluded that the relevant transactions in these cases were the purchase of the family homes, and on that general level, there can be little doubt that the subject of those transactions had a personal, family, or household purpose. More specifically, however, we also believe that the assessments themselves satisfy that statutory requirement. . . . In our view, when a special assessment is used to repair a common roof[,] the assessments are for a household purpose even if more than a single household benefits. [T]he assessments here have a more specific household purpose than taxes collected by a governmental entity. Rather than generally providing for government services, these assessments are collected in order to improve and maintain commonly-owned areas used by each unit owner. The assessments thereby directly benefit each household in the development. As a result, the assessments have a "personal, family, or household purpose". *See Archer, [supra]* (rejecting argument that condominium assessments can be likened to local taxes).

Newman at 481-82, *rev'g. sub. nom. Riter, supra.*

Notwithstanding *Newman's* cogent analysis, the Florida court in *Bryan* remained loyal to the prior federal

district court cases and expressed disagreement with *Newman's* assertion that community association members have the right to be protected by the FDCPA. The court wrote:

> We have concluded, contrary to the *Newman* panel, that the purchase of a condominium unit is not a "consumer transaction" and we are dubious that the question whether an association assessment is a "consumer debt" subject to the Fair Debt Collection Practices Act turns on whether the unit was originally purchased for "personal, family or household" purposes.

Bryan v. Clayton, 698 So.2d 1236 (Fla. 5th DCA 1997). [APX. 1 at 3]

Yet, there can be no doubt that: the FDCPA itself does not, in words, limit the types of "personal, family or household" transactions to be protected beyond the broad phrase "money, property, insurance, or services" [*see* 15 U.S.C. § 1692a(5)]. [APX. 57] Moreover, the conduct complained of herein is the very type of conduct the FDCPA was intended to prohibit, and Congress expressly repealed the exemption for attorneys in the 1986 amendments because of recurring abuses by our profession in the collection of consumer debts. *See, e.g.*, discussion in *Heintz v. Jenkins*, 514 U.S. 291 (1995). Indeed, the instant litigation arose because the homeowners had the temerity (and, we contend, the right) to do exactly as they had been told to do by the law firm – only to be figuratively told by the law firm later, "we were only kidding".

Thus, the point of departure between *Newman* and *Bryan* is whether the FDCPA expressly or by necessary implication carved out an exemption for such misdeeds

when they are conducted in the course of collecting community association dues and assessments and ancillary charges thereto – such as attorney's fees, interest, "lien fees", "wind-up fees", etc.

As indicated in its opinion above, the Florida appellate court in *Bryan* claims to have found such an exemption. However, its opinion fails to articulate how, where and why it reached such result. It professes to be "dubious" of the conclusions reached in *Newman*, but offers no explanation as to the basis for its doubt. Yet, this federal issue is too significant to be so summarily addressed. It has implications far beyond the immediate parties to this cause. The issue stands to affect as many as forty-two million community association residents, and they deserve better than to be left in a sea of uncertainty and grave risk over their relative rights and obligations pertaining to what is probably their most important financial investment.

According to the Internet "Web Site" of the Community Associations Institute (hereafter "CAI"), which organization filed an *amicus curiae* brief on behalf of the community associations in *Newman*, [*see* APX. 64] and which proclaims itself as:

> [T]he nation's voice for condominium, cooperative and homeowners associations. The Institute is a national, non-profit 501(c)(6) association created in 1973 to educate and represent America's residential community associations . . . and related professionals and service providers. . . . CAI has more than 16,000 members in 58 chapters . . . and [a] 42-person staff.

http://www.caionline.org/gettinganswers/whatiscai/index.htm, CAI estimated the national impact of community associations in March, 1998 as follows:

Number of persons living in community associations	42 million
Number of community associations	205,000
Number of community association living units	16.4 million
Estimated resale value of all community association units	$1.7 trillion

http://www.caionline.org/mediacenter/facts/fact2.htm

Even the Internal Revenue Service recognizes the impact of community associations, having designed a special income tax return, IRS form 1120-H, for such organizations. Moreover, the homeowners submit that the issue *sub judice* is likely to be exacerbated the longer it is ignored, because according to CAI: "With more than 50% of new development in large metropolitan areas using a community association format, CAI forecasts continued growth of 6,000 to 8,000 additional community associations each year". *Id.*

Indeed, the *Bryan* court itself acknowledged the significance of this case in its order provisionally granting the law firm attorney's fees:

> The question of law at issue was well presented on appeal and would be considered 'close.'
>
> The suite [sic] was in the nature of a test case presenting questions of far-reaching importance in Florida affecting non-parties who are charged with collecting condominium assessments or are obligated to pay them.

Bryan v. Clayton, No. 96-2406 (Fla. 5th DCA May 12, 1997). [APX. 5]

Thus, society needs this Court to take jurisdiction – now – because a refusal to do so would have a chilling effect upon these ever-increasing millions of community association residents. A declination of jurisdiction would encourage the continuation and expansion by third party independent collection agents of unfair, deceptive, and overreaching collection efforts, with the knowledge that the relatively minor amount involved per collection, and the absence of the potential club of attorney's fees for a successful residential litigant, will result in the ability of the independent collection agent to pummel most community association residents into passive submission, or into *pro se* representation if they do litigate. Nothing could be more repugnant to the goals and aspirations of the FDCPA.

Moreover, a refusal to accept jurisdiction would send a negative, albeit unintended, message that the respondent law firm is being rewarded for its own misconduct. Thus, the homeowners respectfully urge that they and their 42 million fellow community association residents deserve to be, and need to be, informed – now – as to whether, under the FDCPA, they are entitled to the same protection where they live as where they shop.

II. A Florida State Court Of Last Resort Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Expressly And Squarely Settled By This Court, And, *A Fortiori*, Because The State Court Decision Appears To Conflict, At Least in Philosophy, With This Court's Decision In *Heintz v. Jenkins*, 514 U.S. 291 (1995)

In *Bryan*, the Florida Fifth District Court of Appeal has declined the homeowners' plea that the court follow the "plain language" of the FDCPA, contrary to what this Court did (albeit in examining a different aspect of the FDCPA) in *Heintz v. Jenkins*, 514 U.S. 291 (1995). Specifically, although this Court, in *Heintz*, was focusing on the issue of whether the FDCPA contained an implicit exemption for litigating attorneys as opposed to community association attorneys, the approach of this Court in *Heintz* is instructive – and diametrically opposite the approach taken in the lower court herein. In a unanimous opinion, Justice Breyer analyzed the issue and the FDCPA: by examining the conduct "[i]n ordinary English"; 514 U.S. at 294; by referring to "the statute's apparent objective;" 514 U.S. at 296; by scrutinizing the alleged exemption from being subject to regulation by the FDCPA in the face of "the plain language of the Act itself"; 514 U.S. at 297; and by contemplating "the range of reasonable interpretations of the Act's express language". 514 U.S. at 298.

In contrast and apparent contradiction to the above methodology (and conclusions), the state appellate court herein has written instead:

> Appellants urge that we should simply adopt the 'plain meaning' of the 'crystal clear' language of the Act [footnote omitted] to determine

> that a homeowner's maintenance assessment is a debt. This we cannot do because the statute has no plain meaning and its intent is anything but crystal clear. It appears that the federal courts that have addressed the question of the application of this legislation to homeowner's and condominium maintenance assessments have concluded that this legislation does not embrace assessments of property owners for the mutual maintenance of the commonly held areas of the community. *Riter v. Moss & Bloomberg, Ltd.*, 932 F. Supp. 210 (N.D. Ill. 1996); *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla.), *aff'd*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*,___ U.S. ___, 116 S.Ct. 712, 133 L.Ed.2d 666 (1996); *Vosatka v. Wolin-Levin, Inc.*, No. 94-C-4129, 1995 WL 443950 (N.D. Ill. July 21, 1995); *Nance v. Petty, Livingston, Dawson & Devening*, 881 F. Supp. 223 (W.D. Va. 1994); *Archer v. Beasley*, No. 90-2576 (CSF), 1991 WL 34889 (D.N.J. March 5, 1991). We agree that such assessments are not consumer "debts" within the purview of this legislation.

698 So.2d 1236. [APX. 1-2] Even when *Newman* reversed the *Bryan* court's first-cited case above, *Riter*, and shattered the other precedents *Bryan* relied upon, the Florida state appellate court declined to change its conclusions on the clarity or opaqueness of the FDCPA and on the non-applicability thereof to community association dues. In denying the homeowners' motion to stay or recall the mandate, the court wrote:

> As is apparent from the recent decision of the United States Court of Appeals for the Seventh Circuit, *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997), the issue presented is a difficult one. The federal courts are

> groping for a principled, logical and consistent interpretation of a statute that is poorly drafted and whose true scope appears hopelessly lost in its circular definitional scheme.
>
> After our review of the *Newman* decision, we decline to recall [3] our mandate and reconsider our prior affirmance. Although part of the text of our opinion might have been different had this court had the benefit of the decision of the learned panel of the federal appeals court, our decision to affirm would not have been different. Rejection of the 'extension of credit' analysis of *Zimmerman v. HBO Affiliates Group*, 834 F.2d 1163 (3d Cir. 1987) does not dictate the conclusion that the assessment of the owner of a condominium unit for his pro rata share of the costs of maintenance of the common elements and other common costs of condominium unit ownership is a 'consumer' 'debt.'

Bryan, 698 So.2d at 1236. Yet, as seen in the homeowners' first argument above, *Newman* [APX. 64] offers a well-reasoned and thought-provoking analysis, from the same circuit court of appeals that correctly analyzed *Heintz*, and in a manner consistent with *Heintz*, in concluding that community association dues and assessments are "consumer" "debts" under the FDCPA. Jurisdiction should be taken in order that *Heintz* can be reaffirmed, *Bryan* can be repudiated, *Newman* can be declared to be the law of the land, and our citizens can be removed from undue and unfair risk.

---

[3] [*sic* – should read "stay" – the mandate had not yet issued]

CONCLUSION

Between the Florida state court's direct conflict with *Newman*, its seeming philosophical conflict with this Court's decision in *Heintz*, the large number of community associations nationwide, Florida's status as the fourth largest state in population (and probably the second or third largest in community associations), and the grave potential for financial abuse of community association residents if the issue is not addressed and the uncertainty resolved, the issue presented is ripe for determination now. This petition for writ of certiorari should be granted.

Respectfully submitted,

KENNETH L. MANN
Counsel of Record
KENNETH L. MANN, P.A.
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APPENDIX

[698 So.2d 1236]

Kevin E. BRYAN and Renee M. Bryan,

Appellants,

v.

Kenneth M. CLAYTON, et al., Appellees.

No. 96-2406.

District Court of Appeal of Florida,
Fifth District.

May 9, 1997.
Order Denying Stay Sept. 12, 1997.

Kenneth L. Mann and Stephen H. Price of Trickel, Leigh & Mann, P.A., Orlando, for Appellants.

Kenneth M. Clayton and James E. Olsen of Clayton & McCulloh, Orlando, for Appellees.

PER CURIAM.

In this appeal we are asked to decide whether maintenance assessments owed to the appellants' homeowners' association are "debts" for purposes of the Fair Debt Collection Practices Act and the Florida Consumer Collection Practices Act. We conclude that they are not and affirm the decision below.

Appellants urge that we should simply adopt the "plain meaning" of the "crystal clear" language of the act[1] to determine that a homeowners' maintenance

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[1] Debt is defined in 15 U.S.C. § 1692a(5) as follows:

The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the

assessment is a debt. This we cannot do because the statute has no plain meaning and its intent is anything but crystal clear. It appears that the federal courts that have addressed the question of the application of this legislation to homeowner's and condominium maintenance assessments have concluded that this legislation does not embrace assessments of property owners for the mutual maintenance of the commonly held areas of the community. *Riter v. Moss & Bloomberg, Ltd.*, 932 F.Supp. 210 (N.D.Ill.1996); *Azar v. Hayter*, 874 F.Supp. 1314 (N.D.Fla.), *affirmed*, 66 F.3d 342 (11th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 712, 133 L.Ed.2d 666 (1996); *Vosatka v. Wolin-Levin, Inc.*, No. 94-C-4129, 1995 WL 443950 (N.D.Ill. July 21, 1995); *Nance v. Petty, Livingston, Dawson & Devening*, 881 F.Supp. 223 (W.D.Va.1994); *Archer v. Beasley*, No. 90-2576 (CSF), 1991 WL 34889 (D.N.J. Mar. 5, 1991). We agree that such assessments are not consumer "debts" within the purview of this legislation.

AFFIRMED.

COBB, W. SHARP and GRIFFIN, JJ., concur.

---

money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

The act also defines "consumer" in the following manner:

The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

15 U.S.C. § 1692a(3).

ON MOTION TO STAY OR RECALL MANDATE

PER CURIAM.

Appellants have vigorously and effectively prosecuted their appeal of the decision of the lower tribunal denying them a cause of action under the federal and state fair debt collection practices acts. As is apparent from the recent decision of the United States Court of Appeals for the Seventh Circuit, *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir.1997), the issue presented is a difficult one. The federal courts are groping for a principled, logical and consistent interpretation of a statute that is poorly drafted and whose true scope appears hopelessly lost in its circular definitional scheme.

After our review of the *Newman* decision, we decline to recall [sic] our mandate and reconsider our prior affirmance. Although part of the text of our opinion might have been different had this court had the benefit of the decision of the learned panel of the federal appeals court, our decision to affirm would not have been different. Rejection of the "extension of credit" analysis of *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3d Cir.1987) does not dictate the conclusion that the assessment of the owner of a condominium unit for his pro rata share of the costs of maintenance of the common elements and other common costs of condominium unit ownership is a "consumer" "debt." We have concluded, contrary to the *Newman* panel, that the purchase of a condominium unit is not a "consumer" "transaction" and we are dubious that the question whether an association assessment is a "consumer debt" subject to the Fair Debt Collection Practices

Act turns on whether the unit was originally purchased for "personal, family or household" purposes. Appellants' motion to stay or recall mandate is denied.

GRIFFiN, C.J., and COBB and W. SHARP, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

KEVIN E. BRYAN and
RENEE M. BRYAN,

Appellant,

v.

CASE NO. 96-2406

KENNETH M. CLAYTON,
et al.,

Appellee.

_____/

DATE: May 12, 1997

BY ORDER OF THE COURT:

ORDERED that Appellees' MOTION FOR ATTORNEYS' FEES ON APPEAL, filed February 13, 1997, pursuant to Section 768.79, Florida Statutes (1995), is provisionally granted and the above-styled cause is remanded to the lower court to determine entitlement and amount under the statute. If the lower court reaches the issues in section 768.79(7)(b), Florida Statutes (1995), relevant to the setting of an amount of an award, this Court's evaluation of the statutory factors, 1., 3. and 5., determinable on appeal are that:

> The claim was not apparently meritless;
>
> The question of law at issue was well presented on appeal and would be considered "close."
>
> The suite [sic] was in the nature of a test case presenting questions of far-reaching importance in Florida affecting non-parties who are charged with collecting condominium assessments or are obligated to pay them.

I hereby certify that the foregoing is (a true copy of) the original court order.

/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Clerk of the Court, Orange County (CI95-5032)
Kenneth L. Mann, Esq.
Kenneth M. Clayton, Esq.
Randy Hillman, Esq.

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CI95-5032

KEVIN E. BRYAN and RENEE M. BRYAN,
Plaintiffs,

vs.

AMBER RIDGE HOMEOWNERS ASSOCIATION, INC., A Florida corporation, and KENNETH M. CLAYTON and NEAL MCCULLOH, individually and doing business as CLAYTON & MCCULLOH, a Florida general partnership,
Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

THIS CAUSE came before the court on the Motion for Summary Judgment and Motion to Dismiss of defendants Kenneth M. Clayton and Neal McCulloh, individually and d/b/a Clayton & McCulloh. The primary issue is whether the complaint states claims against these defendants for which relief may be granted. For the reasons expressed below, this court finds that it does not.

Plaintiffs, Kevin and Renee Bryan ("the Bryans"), filed suit against the defendants concerning the collection of assessments levied against them by their homeowners association, Amber Ridge Homeowners Association, Inc. ("Amber Ridge"). Specifically, the Bryans have sued

Clayton and McCulloh, individually and d/b/a Clayton & McCulloh, the attorneys and law firm allegedly retained to collect the assessments, for violating the Fair Debt Collection Practices Act under 15 U.S.C.A. sec. 1692 ("the federal act") and the Florida Consumer Collection Practices Act, under sections 559.55-559.785, Florida Statutes ("the state act").[1]

The Fair Debt Collection Practice Act prohibits "debt collector[s]" from making false or misleading representations and from engaging in various abusive and unfair practices. *Heintz v. Jenkins*, ___ U.S. ___, 115 S.Ct. 1489, 131 L.Ed. 2d 395 (1995). The state act similarly restricts certain actions in the collection of consumer debts. Sections 559.552, 559.72, Florida Statutes. A "debt collector," generally, is one

> . . . who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. sec. 1692a(6).[2] The U.S. Supreme Court has recently held that an attorney who is regularly engaged in consumer debt-collection litigation on behalf of creditor clients should be considered a "debt collector" under

---

[1] The Bryans have also filed a declaratory judgment action against Amber Ridge in order to have the court determine whether the claim of lien filed against them for these assessments is legally enforceable.

[2] The general Florida definition of "debt collector" is virtually identical.

the federal act. *Heintz*, 115 S.Ct. at 1490. Thus, it is possible that the attorneys involved in the instant case could be regulated by the acts as "debt collectors." Therefore, logically, the threshold issue is whether the collection these attorneys were trying to make was of a "debt" within the definition of the federal and state acts. The instant defendants argue that it was not.

The term "debt," as used in both the federal and state acts, is defined as:

> . . . any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. sec. 1692a(5); sec. 559.55(1), Florida Statutes.

While the issue has not often been considered, courts of other jurisdictions have held that assessments made by homeowners associations are not "debts" within the definition of the federal act. In *Nance v. Petty, Livingston, Dawson, & Devening*, 881 F. Supp. 223 (W.D. Va. 1994), the court dismissed an action under the federal act holding that a special assessment made by the plaintiffs' subdivision for maintaining a private road did not fall within the act because it did not arise out of a transaction which was "primarily for personal, family, or household purchases." Similarly, in a more recent Florida federal case, *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla. 1995), *aff'd*, 66 F. 3d 342 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 712, 133 L.Ed. 2d 666 (1996), the court found that unspecified fees, which the court assumed were the

assessments by a condominium association to all condominium owners of the costs of maintenance of common areas, were not "debts" falling within the federal act when they did not reflect deferred payments on a prior debt and where there was no evidence of a pro tanto exchange. The court held that the plaintiff's action based on the federal act failed to state a claim upon which relief could be granted. *Id.* at 1321.[3]

The *Nance* and *Azar* courts drew their reasoning from other decisions considering the question of what is a "debt" under the federal act. Specifically, both courts cited *Mabe v. G.C. Services Limited Partnership*, 32 F. 2d 86 (4th Cir. 1994), where the court determined that child support obligations arising out of an administrative support order did not qualify as debts because the obligations were not incurred in exchange for goods and services.

The *Azar* court also considered *Zimmerman v. HBO Affiliate Group*, 834 F. 2d 1163 (3rd Cir. 1987), and *Straub v. Harris*, 626 F. 2d 275 (3rd Cir. 1980), in its decision. In *Zimmerman*, the court found that a demand letter sent

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[3] *See also, Vosatka v. Wolin-Levin, Inc.*, case no. 94 C 4129 (1995 WL 443950) (N.D. Ill. July 20, 1995) (assessments of condominium associations are not from a "transaction" allowing for deferred payments and are in nature of taxes so that they do not qualify as debts under the federal act; court dismissed the case for lack of subject matter jurisdiction); *Archer v. Beasley*, case no. 90-2576(CSF) (1991 WL 34889) (D. N.J. March 5, 1991) (assessment of condominium association not a debt under the federal act in part because no offer or extension of credit was made; defendant's motion for summary judgment granted).

from HBO to the plaintiff and others which demanded that illegal reception of an unauthorized HBO cable signal cease, that equipment be returned, and that the recipients of the letter pay $300 as an out of court settlement was not a debt under the federal act because there was no offer or extension of credit asserted. *Zimmerman*, 834 F. 2d at 1169. The court stated that a transaction which may give rise to a "debt" under the act "is a transaction in which a consumer is offered or extended the right to acquire 'money, property, insurance, or service' which are 'primarily for household purposes' and to defer payment." *Id.* at 1168-69. In *Straub*, the court held that a per capita tax levied by the local taxing authorities was not a "debt" under the act because, at a minimum, the debt must arise "as a result of the rendition of a service or purchase of property or other item of value." *Straub*, 626 F. 2d at 278. The court found that the relationship between taxpayer and taxing authority does not encompass that type of pro tanto exchange which the definition of "debt" envisions. *Id.*

In the instant case, the Bryans allege that Clayton & McCulloh demanded payment from the Bryans of the assessments levied by Amber Ridge, the interest on those assessments, as well as costs and attorneys fees for collecting those amounts. Complaint, ¶¶ 18-19. Further, the Bryans allege that the assessments levied by Amber Ridge were to be used exclusively to promote the recreation, health, safety, and welfare of the residents of the subdivision and for the improvement and maintenance of the common areas. Complaint, Par. 10. The assessments

were not alleged to be an "obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. sec. 1692a(5); sec. 559.55(1). There was no alleged offer or extension of credit. The assessments were not alleged to have arisen as a result of a transaction for personal or household related property or services. And, the assessments do not reflect deferred payments on a prior debt.

Clayton, McCulloh, and Clayton & McCulloh may not be considered "debt collectors" because under the reasoning of the cases discussed above, the amounts those defendants attempted to collect were not "debts" under the federal or state acts. As such, no claim for relief may be stated against these defendants under either act in the instant case.

Therefore, it is ORDERED that the defendants' motion for summary judgment and motion to dismiss is GRANTED.

DONE and ORDERED in Chambers, at Orlando, Orange County, Florida, this 7 day of May, 1996.

/s/ James C. Hauser
Honorable James C. Hauser
Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished, by U.S. mail/hand delivery to Stephan H. Price, Trickel, Leigh, & Mann, P.A. 39 West Pine Street, Orlando, Florida 32801; to Randy Hillman, 203 Hilicrest Ave., Orlando, Florida 32802, and to Kenneth M. Clayton, Clayton & McCulloh, 220 N. Palmetto Ave., Orlando, Florida 32801, on this 8 day of May, 1996.

/s/ Judi Rhyne
Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CI95-5032

KEVIN E. BRYAN and RENEE M. BRYAN,
Plaintiffs,

vs.

AMBER RIDGE HOMEOWNERS ASSOCIATION, INC., A Florida corporation, and KENNETH M. CLAYTON and NEAL MCCULLOH, individually and doing business as CLAYTON & MCCULLOH, a Florida general partnership,
Defendants.
_____/

FINAL JUDGMENT

(Filed Jul. 29, 1996)

THIS CAUSE arose pursuant to this Court's prior "Order Denying Plaintiffs' Motion to Reconsider and Vacate May 7, 1996 Order" dated June 13, 1996, in which this Court set a deadline of June 28, 1996, for Plaintiffs to file an Amended Complaint and, because Plaintiffs have not filed an Amended Complaint pursuant to this Court's prior Order, it is hereby

ORDERED AND ADJUDGED AS FOLLOWS:

1. For reasons set forth in this Court's "Order Granting Defendants' Motion for Summary Judgment

and Motion to Dismiss" dated May 7, 1996, Final Judgment is hereby granted in favor of the Defendants, KENNETH M. CLAYTON, NEAL McCULLOH, and CLAYTON & McCULLOH, and against the Plaintiffs. The Plaintiffs shall take nothing from their action(s) alleged against KENNETH M. CLAYTON, NEAL McCULLOH, and CLAYTON & McCULLOH.

2. This Court retains jurisdiction to determine entitlement of the above-referenced Defendants to an award of attorney fees and costs and in what, if any, amount.

3. This Court further retains jurisdiction as to Count III of Plaintiffs' Complaint which names AMBER RIDGE HOMEOWNERS ASSOCIATION, INC., as Defendant, and further retains jurisdiction as to the Counterclaim of Defendants KENNETH M. CLAYTON, NEAL McCULLOH, and CLAYTON & McCULLOH.

DONE AND ORDERED in Chambers, Orlando, Orange County, Florida this 26 day of July, 1996.

/s/ James C. Hauser
James C. Hauser,
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing final Judgment has been furnished by U.S. Mail to Stephen H. Price, Esquire, Trickel, Leigh & Mann, P.A., 39 West Pine Street, Orlando, Florida, 32801 and Kenneth M. Clayton, Esquire, Clayton & McCulloh, 220 North Palmetto Avenue, Orlando, Florida, 32801 on this 26th day of July, 1996.

/s/ Naomi C. Parker
Judicial Assistant

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FIFTH DISTRICT

KEVIN E. BRYAN and
RENEE M. BRYAN,

Appellant,

v.

CASE NO.
96-2406

KENNETH M. CLAYTON,
et al.,

Appellee.

_____/

DATE: June 25, 1997

BY ORDER OF THE COURT:

ORDERED that Appellants' MOTION FOR CLARIFICATION, REHEARING, REHEARING EN BANC, AND CERTIFICATION, AND FOR ANCILLARY RELIEF, filed May 27, 1997, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Kenneth L. Mann, Esq.
Kenneth M. Clayton, Esq.
Randy Hillman, Esq.

Supreme Court of Florida

WEDNESDAY, JANUARY 28, 1998

KEVIN E. BRYAN, et al.,	**	
Petitioners,	**	
v.	**	CASE NO. 91,612
KENNETH M. CLAYTON, et al.,	**	5TH DISTRICT COURT OF APPEAL NO. 96-2406
Respondents.	**	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

KOGAN, C.J., and OVERTON, SHAW, WELLS and ANSTEAD, JJ., concur

Upon consideration of the Motion for Attorney's Fees filed in the above styled cause by the attorney for Respondents',

IT IS ORDERED that said Motion is hereby granted; the amount to be determined by the trial court. See Fla. R. App. P. 9.400(b), 351 So2d 981.

A True Copy

TEST:

/s/ Sid J. White
Sid J. White
Clerk,
Supreme Court
[SEAL]

H

cc: Hon. Frank J. Habershaw, Clerk
Hon. Fran Carlton, Clerk
Hon. James C. Hauser, Judge
Mr. Kenneth L. Mann
Mr. Kenneth M. Clayton
Mr. James E. Olsen

IN THE CIRCUIT COURT IN
AND FOR ORANGE COUNTY,
FLORIDA

CIVIL CASE NO. CI 95-5032

KEVIN E. BRYAN and RENEE M. BRYAN,

Plaintiffs,

vs.

AMBER RIDGE HOMEOWNERS ASSOCIATION, INC., a Florida corporation, and KENNETH M. CLAYTON and NEAL MCCULLOH individually and doing business as CLAYTON & MCCULLOH, a Florida general partnership

Defendants.

COMPLAINT

The plaintiffs, KEVIN E. BRYAN and RENEE M. BRYAN (hereafter the "Bryans"), sue the defendants, AMBER RIDGE HOMEOWNERS ASSOCIATION, INC., a Florida corporation ("the Association"), and, Kenneth M. Clayton and Neal McCulloh, individually and doing business as CLAYTON & MCCULLOH, a Florida general partnership (collectively "Clayton & McCulloh"), and say:

Allegations Common to All Counts

1. The Bryans are natural persons and residents of Ocoee, Orange County, Florida.

2. The Bryans are the owners and occupants of that property known as 2078 Hedgerow Circle, Ocoee, Florida, and more specifically described as follows:

> Lot 13, Amber Ridge, according to the plat thereof as recorded in Plat Book 29, Page 88, Public Records of Orange County, Florida

(hereafter, "the property").

3. The Association is a Florida non-profit corporation, engaged in the business of acting as a homeowners' association for the Amber Ridge subdivision, with its principal place of business located at 2015 Hedgeron Circle, Ocoee, Orange County, Florida.

4. The Association is responsible for the enforcement of the Declaration of Covenants, Conditions and Restrictions of Amber Ridge, found in official record book 4386, page 3234 of the public records of Orange County, Florida ("the Declaration").

5. The Bryans and all other homeowners of the Amber Ridge subdivision are required to be members in the Association.

6. Clayton & McCulloh is a Florida general partnership engaged in the practice of law with its principal place of business located in Orlando, Orange County, Florida.

7. Neal McCulloh and Kenneth M. Clayton are general partners of Clayton & McCulloh.

8. The Association has the power, pursuant to Article IV of the Declaration, to collect assessments and to bring an action at law against an owner for nonpayment.

9. The Association is responsible, pursuant to Article VIII of the Declaration, for the exclusive management, control and maintenance of the common areas and any improvements thereon. Pursuant to the same article, the Association has the duty to keep the common areas and any improvements thereon in good, clean, attractive and sanitary condition, order and repair.

10. The assessments levied by the Association are to be used exclusively to promote the recreation, health, safety, and welfare of the residents of the subdivision and for the improvement and maintenance of the common areas.

11. All conditions precedent to the Plaintiffs' right to bring this action have occurred, been performed or waived.

COUNT I – FAIR DEBT COLLECTION PRACTICES ACT

12. Plaintiffs reallege and incorporate ¶¶ 1 through 11 above as if fully set forth herein.

13. This is an action against Clayton & McCulloh under 15 U.S.C.A. § 1692, also referred to as the Fair Debt Collection Practices Act (hereafter referred to as "the Act").

14. This action does not exceed $15,000.00 exclusive of costs, interest and attorney's fees, but arises from the same set of facts as Count II of this complaint which confers jurisdiction in this matter.

15. At all times material, Clayton & McCulloh was a "debt collector" as defined by the Act.

16. At all times material, Clayton & McCulloh attempted to collect a "debt", as defined by the Act, from the Bryans.

17. At all times material, the Bryans were "consumers" as defined by the Act.

18. On or about December 1, 1994, Clayton & McCulloh sent the Bryans, via certified mail, a demand for the payment of assessments allegedly levied by the Association for the period beginning January 1993 through December 1994. A true copy of the demand letter is attached and incorporated as Exhibit "A".

19. In addition to the outstanding assessments, the letter demanded payment of interest at the rate of 12% per annum through November 1994, as well as costs and attorney's fees allegedly incurred through December 1, 1994.

20. The amount claimed by Clayton & McCulloh's demand letter as due and owing was $505.07.

21. Clayton & McCulloh's demand letter threatened the Bryans with a lien on the Bryan's property if the amount of $505.07 was not paid on or before December 14, 1994.

22. Clayton & McCulloh's demand letter further threatened the Bryans with foreclosure if the Bryans failed to pay the stated amount, together with any additional assessments, costs, interest and attorney's fees, within 30 days after the filing of the lien.

23. Clayton & McCulloh's demand letter told the Bryans' not to contact the Association nor the management company with any questions, but to communicate

only with the law firm, and yet also threatened that they would be charged additional costs and attorney's fees for any communications made by the Bryans to said law firm regarding their account, other than the full and immediate payment of the alleged debt.

24. In purported compliance with the Act, Clayton & McCulloh attached, as a third page, an exhibit outlining the Bryans' statutory right to dispute the debt and to request verification as well as the name and address of the creditor ("the validation notice").

25. However, the validation notice of Clayton & McCulloh also asserted that the thirty day verification period would not in any way lengthen the December 14, 1994 deadline.

26. On or about December 8, 1994, Kevin Bryan remitted the $505.07 requested by Clayton & McCulloh via certified mail. A true copy of the cashier's check payable to "Clayton & McCulloh", the receipt for certified mail and a copy of Kevin Bryan's transmittal letter are attached and incorporated as Exhibit "B".

27. Pursuant to the Act and Clayton & McCulloh's instructions, Kevin Bryan disputed the amount owed. He requested: written verification of said debt; the name(s) and address(es) of the current creditor(s); and an itemized billing statement.

28. On or about January 26, 1995, some 45 days later, Clayton & McCulloh returned the Bryans' cashier's check. A true copy of Clayton & McCulloh's rejection letter is attached and incorporated by reference as Exhibit "C".

29. Although the Bryans' payment was sent prior to the December 14, 1994 deadline, Clayton & McCulloh's rejection letter asserted the Bryans were delinquent for additional assessments, interest, costs, and attorney's fees, etc., above and beyond the debt originally demanded.

30. Clayton & McCulloh's rejection letter threatened the Bryans with additional collection procedures if the Bryan account were [sic] [not] brought current within 14 days from the January 26, 1995 communication.

31. In an effort to force immediate payment of the purported debt, Clayton & McCulloh's rejection letter represented that the law firm would continue to perform such tasks as "writing letters, receiving payments, pursuing foreclosure, and dealing with the overall account" until the account was brought completely current.

32. Clayton & McCulloh's letter refused to provide the Bryans with the nature or the amount of the newly incurred costs or the total purportedly due. Rather, the Bryans were instructed to contact the firm to receive an exact payoff figure.

33. At the time of the January 26, 1995 rejection letter, Clayton & McCulloh had still not provided the Bryans with any verification of their debt or any of the other requested information.

34. The Bryans also sought information directly from the Association but were referred to Clayton & McCulloh for response thereto.

35. At the time of the January 26, 1995 rejection letter, neither Clayton & McCulloh nor the Association

had ever made demand for any additional assessments. In fact, the 1995 assessment had not been made, was not yet delinquent, and had not been turned over to Clayton & McCulloh for collection.

36. The Bryans did not remit any monies in response to Clayton & McCulloh's January 26, 1995 demand since payment had been fully tendered previously and rejected.

37. On or about January 30, 1995, Renee Bryan contacted Clayton & McCulloh to discuss the return of their cashier's check.

38. During the course of this conversation, personnel from Clayton & McCulloh threatened Renee Bryan with the imposition of additional fees, a lien, and the ultimate foreclosure of her home, if the balance, as determined by Clayton & McCulloh, were not paid immediately.

39. On or about February 2, 1995, Clayton & McCulloh placed a call to the Bryans.

40. During this conversation, Neal McCulloh claimed that the new balance owed by the Bryans was now $991.54, the increase from $505.07 being primarily attributable to purported additional attorney's fees.

41. Clayton & McCulloh told Mr. Bryan that a lien would be placed against his house, and foreclosure procedures would be commenced, if the new amount were not paid.

42. At the time of the telephone conversation, Clayton & McCulloh had still not provided the Bryans with

the verification of their debt or any of the other requested information.

43. On February 20, 1995, the Bryans lodged a formal complaint with the Association regarding its failure and refusal to administer and enforce the rules and restrictions of the Association. A true copy of Kevin Bryan's letter is attached and incorporated as Exhibit "D".

44. Along with the written complaint, the Bryans remitted the amount of $125.00, to be applied exclusively to the 1995 assessments. On information and belief, said check is currently held, uncashed, by Clayton & McCulloh.

45. On or about March 6, 1995, the Bryans received more correspondence from Clayton & McCulloh that purported to provide a written breakdown of the amounts owed to the Association by the Bryans. A true copy of the March 6, 1995 correspondence and the alleged verification of debt, (purportedly aggregating $1,196.56 as of February 4, 1995, including $836.26 in "costs, collection charges, and attorney's fees") is attached and incorporated as Exhibit "E".

46. Also included with the March 6, 1995 correspondence was a letter dated March 3, 1995 in which Clayton & McCulloh asserted the Bryans now owed the Association the amount of $1,199.80 including fees and interest. A true copy of the March 3, 1995 correspondence is attached and incorporated as Exhibit "F".

47. The March 3, 1995 correspondence also listed a "lien charge" in the amount of $125.00, purportedly levied against the Bryans.

48. In the March 3, 1995 correspondence, Clayton & McCulloh told the Bryans that once their account was paid in full, Clayton & McCulloh would provide the Bryans with a Release of Lien.

49. As of March 3, 1995, Clayton & McCulloh had not filed any lien against the Bryans in the public records of Orange County, Florida.

50. The March 3, 1995 correspondence failed to include any warning that Clayton & McCulloh was attempting to collect a debt and that any information obtained would be used for that purpose as required by the Act.

51. On or about June 21, 1995, some 110 days after the purported "lien charge" was imposed, a claim of lien was filed against the Bryans' property on behalf of the Association by Clayton & McCulloh. A true copy of the claim of lien is attached and incorporated as Exhibit "G" hereto. This lien was recorded in Official Records Book 4907, Page 2090 of the Public Records of Orange County, Florida.

52. The claim of lien asserted it secures assessments of $324.25, interest thereon, and attorney's fees and costs incidental to the enforcement of the lien.

53. All of the foregoing correspondence from Clayton & McCulloh and the telephone conferences constitute "communications", as defined by the Act.

54. The Bryans have hired the law firm of Trickel, Leigh & Mann, P.A. to represent them in this action and are obligated to pay said firm a reasonable attorney's fee.

55. Pursuant to 15 U.S.C.A. § 1692k, the Bryans are entitled, if they successfully enforce liability under the Act, to reasonable attorney's fees.

56. Clayton & McCulloh have violated the Act.

57. Clayton & McCulloh's violations of the Act include, but are not limited to, the following:

a. Clayton & McCulloh violated 15 U.S.C.A. § 1692g(a) by attempting, in its December 1, 1994 communication, to cause the Bryans to disregard the statutory notice. The threat of a lien filing by December 14, 1994 contradicted and overshadowed the statutorily required notice.

b. Clayton & McCulloh violated 15 U.S.C.A. § 1692g(a) by falsely stating that the Bryans' right to verification, as outlined in the Act, would not in any way lengthen the December 14, 1994 payment deadline imposed by Clayton & McCulloh.

c. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(10) by attempting to imply that the language added by Clayton & McCulloh regarding the 30 day right of verification and its effect on the deadlines imposed was part of the Act and required for compliance.

d. Clayton & McCulloh violated 15 U.S.C.A. § 1692g(a) by attempting to discourage the Bryans from pursuing their rights under the Act with promises of additional costs and attorney's fees in the event of any further communications with the firm.

e. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(2) by falsely representing the amount of the debt in its December 1, 1994 communication.

f. Clayton & McCulloh violated 15 U.S.C.A. §§ 1692e(2) and 1692f by falsely claiming the Bryans' cashier's check was for an insufficient amount and was not delivered in accordance with the terms and conditions imposed by Clayton & McCulloh's demand letter.

g. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(5) by threatening additional collection procedures which could not be legally performed until Clayton & McCulloh provided the proper debt validation information requested by the Bryans.

h. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(10) by falsely representing in the January 26, 1995 communication that foreclosure was being pursued when no such action had been taken or could legally be taken.

i. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(10) by falsely representing in its January 26, 1995 communication that the Bryans had incurred additional assessments, legal fees and costs since their December 8, 1994 tender of payment.

j. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(2) by falsely representing the services rendered on the Bryan account in its March 3, 1995 communication.

k. Clayton & McCulloh violated 15 U.S.C.A. § 1692g(b) by attempting to collect the alleged debt via threatening telephone conferences prior to providing the Bryans with the requested debt verification.

l. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(10) by falsely implying, in its March 3, 1995 communication, that a lien had been placed on the Bryans' property.

m. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(2) by falsely representing, in its March 3, 1995 communication, the character and status of that portion of the alleged debt attributable to Clayton & McCulloh's collection efforts since the Bryans' December 8, 1995 verification request.

n. Clayton & McCulloh violated 15 U.S.C.A. § 1692f(1) by imposing additional costs on the Bryans for collection efforts which were not permitted by law.

o. Clayton & McCulloh violated 15 U.S.C.A. § 1692g by failing to ever respond to the Bryans' original verification request regarding the amount originally demanded ($505.07) by Clayton & McCulloh.

58. Clayton & McCulloh's acts as described above were done intentionally and maliciously in knowing and wilful violation of the Act, for the purpose of coercing the Bryans to pay the alleged debt without any basis in fact or law.

59. As a direct and proximate result of Clayton & McCulloh's conduct, the Bryans have suffered stress and embarrassment and have expended both time and money in an attempt to clear their name.

60. As a result of the above mentioned violations of the Act, the Bryans have suffered actual damages, including emotional distress, and are also entitled to statutory damages, court costs and attorney's fees.

WHEREFORE, the Bryans respectfully request that judgment be entered against Kenneth M. Clayton and Neal McCulloh, jointly and severally and d/b/a as Clayton & McCulloh for:

a. Actual damages;

b. Statutory damages of $1,000.00 pursuant to 15 U.S.C.A. § 1692k.

c. Costs and reasonable attorney's fees pursuant to 15 U.S.C.A. § 1692k.

d. Such other and further relief, including injunctive relief, as may be just and proper.

COUNT II – FLORIDA CONSUMER COLLECTION PRACTICES ACT

61. This is an action against Clayton & McCulloh for relief under §§ 559.55-559.785 Florida Statutes (hereafter the "Florida Act").

62. The Bryans reallege paragraphs 1-11 and 18-52 and 54 as if fully set forth herein.

63. This is an action which exceeds $15,000 exclusive of costs, interest and attorneys' fees.

64. At all times material, Clayton & McCulloh was a "debt collector" as defined by the Florida Act.

65. At all times material, Clayton & McCulloh attempted to collect a "debt", as defined by the Florida Act, from the Bryans.

66. At all times material, the Bryans were "consumers", as defined by the Florida Act.

67. Clayton & McCulloh's violations of the Florida Act include, but are not limited to, the following:

a. Clayton & McCulloh violated § 559.72(9) *Fla. Stat.* (1994) by threatening additional collection procedures which could not be legally performed until Clayton & McCulloh provided the proper debt validation information requested by the Bryans.

b. Clayton & McCulloh violated § 559.72(9) *Fla. Stat.* (1994) by falsely representing in the January 26, 1995 communication that foreclosure was being pursued when no such action had been taken or could legally be taken.

c. Clayton & McCulloh violated § 559.72(9) *Fla. Stat.* (1994) by falsely representing in its January 26, 1995 communication that the Bryans had incurred additional assessments and expenses since their December 8, 1994 tender of payment.

d. Clayton & McCulloh violated § 559.72(9) *Fla. Stat.* (1994) by imposing additional costs and legal fees on the Bryans for collection efforts which were not permitted by law.

68. Clayton & McCulloh's acts as described above were done intentionally, and maliciously in knowing and wilful violation of the Florida Act, for the purpose of coercing the Bryans to pay the alleged debt.

69. As a direct and proximate result of Clayton & McCulloh's conduct, the Bryans have suffered stress and embarrassment and have expended both time and money in an attempt to clear their name.

70. As a result of the above mentioned violations and their mens rea, Clayton & McCulloh is liable to the

Bryans in accordance with the Florida Act, the greater of actual damages suffered by the Bryans, statutory damages in the amount of $500.00, together with punitive damages, court costs and reasonable attorney's fees.

WHEREFORE, the Bryans respectfully request that judgment be entered against Kenneth M. Clayton and Neal McCulloh, jointly and severally and d/b/a Clayton & McCulloh for:

a.The greater of actual damages suffered by the Bryans or statutory damages of $500.00 pursuant to § 559.77 *Fla. Stat.* (1994).

b.Punitive damages pursuant to § 559.77 *Fla. Stat.* (1994).

c.Costs and reasonable attorney's fees pursuant to § 559.77 *Fla. Stat.* (1994).

d.Such other and further relief, including injunctive relief, as may be just and proper.

COUNT III – DECLARATORY JUDGMENT

71. This is an action against the Association for declaratory judgment and supplemental relief under chapter 86, Florida Statutes.

72. The Bryans reallege paragraphs 1-11, 18-52 and 54 as if fully set forth herein.

73. As demonstrated by the aforementioned allegations, there exists an actual and justiciable controversy between Plaintiff and the Association.

74. Specifically, the Association has filed or caused to be filed a claim of lien in the public records of Orange

County, against the property of the Bryans, for the purported non-payment of assessments.

75. Despite collecting significant revenues from charges and assessments, the Association has refused, and continues to refuse, to enforce the covenants, conditions and restrictions outlined in the Declaration.

76. The Bryans are in doubt and uncertain as to whether the claim of lien is legally enforceable in view of: (a) the Bryans' timely tender of the outstanding amounts alleged by Clayton & McCulloh; (b) the Bryans' homeowner's assessment having been paid through March 31, 1993 at the closing when they purchased the property, at which time it was represented that homeowner's assessments were due on a March 31 fiscal year not a calendar fiscal year; (c) the failure of the Association to enforce the covenants, conditions and restrictions of the Declaration; and, (d) the Association's failure to ever furnish a true and reasonably detailed verification of the amount actually owed by the Bryans including the purported assessment by fiscal year.

77. Furthermore, the Bryans are in doubt and uncertain as to the right, power and duty of the Association to continue to collect assessments and charges while, at the same time, abdicating its responsibilities under the Declaration.

78. A judicial declaration concerning the Association's right, power and duty to enforce the covenants, conditions and restrictions of the Declaration is necessary and appropriate given the continuing decline of the common areas and the overall condition of the Association.

79. A judicial declaration concerning the continued role of the Association in the enforcement of the covenants, conditions and restrictions of the Declaration is necessary and appropriate in order to determine if the Association should continue to collect assessments or, in the alternative, if a receiver or professional management company should be appointed to manage the affairs of the Association.

WHEREFORE, the Bryans respectfully request that the court enter a judgment against the Association, as follows:

a. Declaring that the Association has failed to enforce the covenants, conditions and restrictions of the Declaration.

b. Declaring the lien filed by the Association null and void.

c. Enjoining the Association from assessing any charges or assessments or, in the alternative, impeaching the acting Board of Directors and Officers and appointing a receiver or professional management company to manage the affairs of the Association including the enforcement of the covenants, conditions and restrictions of the Declaration.

d. Awarding the Bryans damages;

e. Awarding the Bryans their reasonable attorney's fees and costs;

f. Granting such further or alternative relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

The Bryans demand a jury trial in this action of all issues triable by jury.

Dated this 8th day of August, 1995.

TRICKEL, LEIGH & MANN, P.A.

BY: /s/ Stephen H. Price
Stephen H. Price
Florida Bar No. 956937
39 W. Pine Street
Orlando, FL 32801
(407) 422-5154
Attorneys for Plaintiffs

EXHIBIT

A

Clayton & McCulloh

Attorneys at Law
220 North Palmetto Avenue
Orlando, Florida 32801

KENNETH M. CLAYTON
NEAL McCULLOH
PETER R. McGRATH
CHRISTINE E. LONG

TEL (407) 425-4259
FAX (407) 425-4269

December 1, 1994

CERTIFIED MAIL/RETURN RECEIPT REQUESTED P 399 873 643

Mr. and Ms. Kevin Bryan
2078 Hedgerow Circle
Ocoee, Florida 34761

RE: DEMAND FOR ASSESSMENTS
AMBER RIDGE HOMEOWNER'S ASSOCIATION, INC.
UNIT #013

Dear Mr. and Ms. Bryan:

Please be advised that I have been retained by AMBER RIDGE HOMEOWNER'S ASSOCIATION, INC. to collect the maintenance fees outstanding against the property owned by you within AMBER RIDGE for the time period commencing January 1993 and continuing until your account is brought current. The amount due and owing by you is $505.07, which sum includes Assessments for the time period of January 1993 through December 1994, interest at a rate of 12% per annum through November 1994, and costs and attorney's fees to

date. If said sum is not paid on or before December 14, 1994, a lien will be filed against the property. If said sum plus such additional assessments, costs, interest and attorney's fees as come due hereafter are still not paid within thirty days after that, the Association intends to pursue the legal remedies available to it, and/or foreclose on your property.

The amount due on your account will increase as assessments, costs, attorney's fees and other charges continue to accrue; therefore, just prior to making your payment be sure that you contact this office at the above phone number to obtain an exact payoff figure.

It is with regret that the Association has had to pursue the matter this far, but considering the period of time that this bill has remained unpaid, the Board of Directors have decided that this is the responsible approach to this problem.

Payments are to be made only **by cashier's check or money order payable to "Clayton & McCulloh"** and should be sent to the address of this law firm.

All telephone calls and discussions regarding this matter are to be directed to my Assistant, Mr. Jason Malone, at my office. Understand that costs and attorney's fees will be charged to you based on the time which this office expends in connection with your account. Extended or multiple discussions with you will cause your fees to increase. Please do not contact individual Board Members of the Association or the Management Company regarding this matter as they will only direct you to call my office.

Any proposed method of payment other than the entire amount will have to be presented to me in writing and approved by the Board of Directors for the Association at a regularly scheduled meeting. Additionally, any proposed payment agreement must be accompanied by a cashier's check in the amount of $150.00 made payable to "Clayton & McCulloh" to cover the attorney's fee associated with reviewing and processing the proposal through the Association. This fee shall be deemed earned by this law firm when received without regard to the disposition of the matter by the Association. Additionally, this fee shall not decrease the amount owed to the Association for assessments, interests, costs or other attorney and/or collection fees. In no event, shall this law firm be deemed at any time to represent you in this matter. Please be advised that this firm recommends that the Association not accept payment proposals with a payout term greater than six (6) months. If you must propose a payment plan, please keep the amounts of the proposed installments equal, and the term of the payout six (6) months or less. Please be further advised that if the $150.00 charge referenced above is not sufficient to defray all the costs and expenses associated with the payment agreement, such will be added to the total amount due the Association and will be collected in the same manner as other sums owed to the Association. Additionally, should the Association agree to allow you to pay your delinquent assessments on an "installment" basis, an additional $10.00 handling charge per installment will be added to your balance.

Additionally, for compliance with the Fair Debt Collection Act, please see Exhibit "A" attached hereto.

To avoid incurring additional costs and attorney's fees, you must bring your account current immediately.

Govern yourself accordingly.

Sincerely,

/s/ Neal McCulloh
Neal McCulloh

NM/JM

EXHIBIT

A

NOTICE: The undersigned attorney is attempting to collect a debt owed to the Association, and any information obtained will be used for that purpose.

Unless you, within thirty (30) days after your receipt of this letter, dispute the validity of the aforesaid debt (or any portion thereof) owing to the Association, the undersigned attorney shall assume that the said debt is valid. If you notify the undersigned in writing within the said thirty (30) day period that the aforesaid debt, or any portion thereof, is disputed, the undersigned attorney shall obtain written verification of said debt from the Association and/or a copy of the judgment against you. A copy of such verification or judgment will be mailed to you by the undersigned attorney's office. Upon your written request, within the thirty (30) day period, our office shall provide you with the name and address of the original creditor, if different from the current creditor. Note the thirty (30) day verification period referenced

above shall not in any way lengthen the deadline for payment in this letter.

EXHIBIT

B

Dec. 8, 1994

Dear Clayton & McCulloh,

I am sending you a cashiers check (019393) in the amount of 505.07, which is the full amount said owed to your firm.

Under the Fair Dept [sic] Collection Act, I am disputing the amount said owed. I am requesting a written verification of said dept [sic], along with the names and addresses of the current creditors and an itemized billing statement.

I expect this information within or on thirty days.

Sincerely,

/s/ Kevin Bryan
Kevin Bryan
2078 Hedgerow Circle
Ocoee Fl. 34761
Amber Ridge Unit #013

[Copy of Check and Postage Paid Receipt Omitted in Printing]

EXHIBIT

C

Clayton & McCulloh

Attorneys at Law
220 North Palmetto Avenue
Orlando, Florida 32801

KENNETH M. CLAYTON
NEAL McCULLOH
PETER R. McGRATH
CHRISTINE E. LONG

TEL (407) 425-4259
FAX (407) 425-4269

January 26, 1995

Kevin E. Bryan
2078 Hedgerow Circle
Ocoee, Florida 34761

RE: DELINQUENT MAINTENANCE FEES
AMBER RIDGE UNIT #013

Dear Mr. Bryan:

Enclosed herewith please find your check(s) dated 12/06/94, in the amount of $505.07 made payable to "Clayton & McCulloh". Unfortunately, even if the enclosed check was credited to your account it would remain delinquent for assessments, interest, costs, attorney's fees, etc. including same accruing after the date of this letter.

Please be advised that if your account is not brought current within fourteen (14) days from the date of this letter that we will continue with collection procedures on your unit. Moreover, until your account is brought completely current, my office will be forced to spend additional time in pursuit of this matter doing such tasks as

writing letters, receiving payments, pursuing foreclosure, and dealing with the overall account, all for which your account will be billed on an hourly basis. We do not wish to run up attorney's fees, costs, etc. on your account, however, until your account is brought current or foreclosure is completed, we will have no choice. We, therefore, strongly recommend that you bring your account current as soon as possible. Furthermore, just prior to making your final payment, it will be necessary for you to contact this office at the above telephone number to obtain an exact payoff figure, as the balance due can change on a day to day basis. As you have been previously advised, all payments must be made **by cashier's check or money order *only*** made payable to **"Clayton & McCulloh"** and sent to the address of this law firm.

We also recommend that you consider creating a local fund and/or means of making payment to the Association so that your account will remain current and future collection procedures will not be necessary.

Please also be informed that the following will not justify failure to pay your assessments as they become due:

1. Unit not ready for occupancy.
2. Defects in construction.
3. Disagreements with the Association's method of operating and/or managing the Association.
4. Disagreements with the Developer and/or Sales Agent.
5. Lack of use of common Elements.

The only reason we have not more actively pursued foreclosure on your account to date is your apparent attempts to resolve this matter. However, be that as it may, we must now insist that you make appropriate and timely arrangements to bring your account current; otherwise, further collection procedures will be instituted.

The undersigned attorney is attempting to collect a debt owed to the Association, and any information obtained will be used for that purpose.

Costs and attorney's fees have been incurred by the Association in connection with the collection of this account. To avoid incurring additional costs and attorney's fees, you must bring your account current immediately.

I hope this letter has sufficiently apprised you of the manner in which accounts in my office will be handled. We regret any inconvenience this matter has caused you, but we do intend to utilize all available and appropriate collection procedures.

Sincerely,
/s/ Neal McCulloh
Neal McCulloh

NM/

Enclosures

EXHIBIT

D

Feb. 20, 1995

Dear Board of Directors for Amber Ridge Homeowners Assoc.,

I am writing this letter to lodge a written complaint about the number of violations that have been allowed to take place in the Amber Ridge Neighborhood. There is satelite dishes, 3 radio tower, clothes line, boats parked in the driveway, yards not being kept up, the Amber ridge sign not on the front brick wall, dead flowers not being replaced, fencing along Adair St. are all different colors, broken cypress fence along Claracona Road, common properties along Claracona Road not being kept up and our drainage pond that has not been maintained.

Some of these concerns were previously brought up to the original Amber Ridge Home Owners Assoc. with no success of correction.

I feel that because of these violations, it has caused the property value of my home to decrease.

Your concern in these matters would be greatly appreciated!

Thank You,

/s/ Kevin Bryan
Kevin Bryan

Lot #13

EXHIBIT

E

Clayton & McCulloh

Attorneys at Law
220 North Palmetto Avenue
Orlando, Florida 32801

KENNETH M. CLAYTON
NEAL McCULLOH
PETER R. McGRATH
CHRISTINE E. LONG

TEL (407) 425-4259
FAX (407) 425-4269

March 6, 1995

Mr. and Mrs. Kevin Bryan
2078 Hedgerow Circle
Ocoee, Florida 34761

RE: Verification of Debt

Dear Mr. and Mrs. Bryan:

Enclosed herewith please find the Verification of Debt which you requested. As said verification lists assessments through December, 1995 and interest through January, 1995, we presume you would like an update of the total amount owed including attorney fees, assessments, interest and other charges. Therefore, we have also included a payoff breakdown letter.

Until your account is brought completely current, my office will be forced to spend additional time in pursuit of this matter doing such tasks as writing letters, receiving payments, pursuing foreclosure, and dealing with the overall account, all for which your account will be billed on an hourly basis. We do not wish to run up attorney's fees, costs, etc. on your account unnecessarily, however,

we will have no choice but to continue to pursue collection. We, therefore, strongly recommend that you bring your account current as soon as possible. **Furthermore, just prior to making your final payment, it will be necessary for you to contact this office at the above telephone number to obtain an exact payoff figure, as the balance due can change on a day to day basis.** We also recommend that you consider creating a local fund and/or means of making payment to the Association so that your account will remain current and future collection procedures will not be necessary.

Please be advised that if your account is not brought current within ten (10) days from the date of this letter that we will continue with collection procedures on your unit. As you have been previously advised, all payments must be made **by cashier's check or money order *only*** made payable to **"Clayton & McCulloh"** and sent to the address of this law firm.

The undersigned attorney is attempting to collect a debt owed to the Association, and any information obtained will be used for that purpose.

Costs and attorney's fees have been incurred by the Association in connection with the collection of this account. To avoid incurring additional costs and attorney's fees, you must bring your account current immediately.

If you have any questions or comments regarding this matter please call at your earliest possible convenience.

Sincerely,

/s/ Neal McCulloh
Neal McCulloh

NM/mec
Enclosure

VERIFICATION OF DEBT

Association (Creditor):
AMBER RIDGE HOMEOWNER'S ASSOCIATION, INC.

Association's Address:
C/O FLORIDA MANAGEMENT SERVICES OF ORLANDO
POST OFFICE BOX 73
ORLANDO, FLORIDA 32802

Unit or Lot Number:
UNIT 013

To: Unit or Lot Owner(s):
KEVIN E. BRYAN AND RENEE M. BRYAN

The undersigned, NEAL BAILEY the AGENT of the above-mentioned ASSOCIATION hereby verifies that the following sums are due and owing as assessments, interest, cost, collection charges and attorney's fees to the ASSOCIATION as of the date of the signing of this Verification:

(a.) $324.25 are assessments for January 1993 through December 1995 .

(b.) $36.05 for interest on assessments for January 1993 through January 1995 .

(c.) $836.26 for cost, collection charges and attorney's fees.

The total due as of February 4, 1995 is $1196.56 which sum shall increase as additional assessments, interest, cost, and attorney's fees come due.

DATED THIS 3 DAY OF March , 1995 .

BY: Neal Bailey

TITLE: Agent

EXHIBIT

F

Clayton & McCulloh

Attorneys at Law
220 North Palmetto Avenue
Orlando, Florida 32801

KENNETH M. CLAYTON
NEAL McCULLOH
PETER R. McGRATH
CHRISTINE E. LONG

TEL (407) 425-4259
FAX (407) 425-4269

March 3, 1995

Mr. and Mrs. Kevin Bryan
2078 Hedgerow Circle
Ocoee, Florida 34761

RE: DELINQUENT HOMEOWNERS ASSOCIATION ASSESSMENTS AMBER RIDGE HOMEOWNER'S ASSOCIATION, INC.

Dear Mr. and Mrs. Bryan:

As you requested on December 8, 1994, I am hereby providing you with a written breakdown of the amount owed on this account. Once the account is paid in full, we will be happy to provide you with a Release of Lien.

The amounts due are itemized as follows:

Maintenance fees	01/93 thru 12/95	$ 324.25
Interest at 12%	01/93 thru 02/95	$ 39.29
Lien Charge		$ 125.00
Attorneys Fees & Costs		$ 556.26
Wind-up charge		$ 155.00
Total Due by March 16, 1995		**$1199.80**

All payments must be made by **cashier's check or money order *only*** made payable to **"Clayton & McCulloh"** and sent to the address of this law firm. If this account is not brought current within ten (10) days from the date of this letter, we will continue with collection procedures on the unit.

Understand that the Total Due specified above is in the nature of a settlement offer. As such, said figure does not reflect all the charges for the time expended by Attorneys and other professionals. Similarly, said figure may not reflect all the cost associated with this collection. Therefore, if the amount specified is not received in this office by the date indicated, said offer shall be null and void, and the Association reserves the right to pursue collection for all sums due (i.e., the total amount of Attorney fees and costs associated with collection of your account).

Please be advised that the amount due shall increase if any further work is required on this account other that [sic] just processing the payoff. Unless this account is brought completely current, my office will be forced to spend additional time in pursuit of this matter doing such tasks as writing letters, receiving payments, pursuing foreclosure, and dealing with the overall account, all for which your account will be billed on an hourly basis. We do not wish to run up attorney's fees, costs, etc. on your account, however, until your account is brought current or foreclosure is completed, we will have no choice but to pursue this matter further.

Sincerely,

Neal McCulloh

NM/mec

EXHIBIT

G

[Recorded June 21, 1995
in O.R. Book 4907, Pg 2090,
Orange County, Florida]

CLAIM OF LIEN

NOTICE IS HEREBY GIVEN that **AMBER RIDGE HOMEOWNER'S ASSOCIATION, INC.**, hereinafter referred to as "Association", (the Registered Agent of which is Gary Russell, 608 East Central Boulevard, Orlando, Florida 32801) pursuant to the provisions of the DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF AMBER RIDGE recorded in Official Records Book 4386, Page 3234, of the Public Records of Orange County, Florida, as amended and supplemented, claims a lien for unpaid assessments, interest and collection charges, together with costs and attorney's fees incurred by the Association incident to the collection of such assessments or enforcement of such lien, upon real property more particularly described as follows:

> Lot 13, AMBER RIDGE, according to the plat thereof as recorded in Plat Book 29, Page 88, Public Records of Orange County, Florida.

The name and address of the owner of record is:

> Kevin E. Bryan and Renee M. Bryan
> 2078 Hedgerow Circle
> Ocoee, Florida 34761

This claim of Lien is to secure the assessment(s) and other expenses levied by the Association in the amount and for the dates indicated and for such other sums as may become due thereafter:

A) Assessments in the amount of $324.25 for the time period of January 1993 through December 1995.

B) Together with interest at 12% per annum from the time each and every assessment has and shall come due, collection charges, attorney's fees, title search expenses and other costs incidental to the enforcement of this lien.

WITNESS MY HAND AND SEAL this 30th day of May, 1995.

Lienor:
AMBER RIDGE HOMEOWNER'S ASSOCIATION, INC.

WITNESSES

(sign) /s/ James R. Morgan

(print) /s/ James R. Morgan

(sign) /s/ Rick Glass

(print) /s/ Rick Glass

(sign) /s/ Linda L. Santo

(print) /s/ LINDA L. SANTO

(title) /s/ President

(address) /s/ 2015 Hedgerow Cir.
Ocoee, Fl 34761

STATE OF FLORIDA
COUNTY OF Orange

THE FOREGOING INSTRUMENT was acknowledged before me this 30th day of May, 1995 by Linda Santo, as President of AMBER RIDGE HOMEOWNER'S

ASSOCIATION, INC., a Florida Corporation, on behalf of the corporation. He/she is personally known to me or has produced _____ as identification.

NOTARY PUBLIC

(sign) /s/ Susan D. Falls

(print) /s/ Susan D. Falls

State of Florida at Large
My Commission Expires:

THIS INSTRUMENT PREPARED BY:
Neal McCulloh, Esquire
Clayton & McCulloh
Attorneys at Law
220 North Palmetto Avenue
Orlando, Florida 32801

FAIR DEBT COLLECTION PRACTICES ACT, 15 USCA

§ 1692. Congressional Findings and Declaration of Purpose

(a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive, debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

(Pub.L. 90-321, Title VIII, § 802, as added Pub.L. 95-109, Sept. 20, 1977, 91 Stat. 874.)

§ 1692a. Definitions

As used in this subchapter –

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or

due or asserted to be owed or due another. * * * The term does not include –

* * *

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

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§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(2) The false representation of –

(A) the character, amount, or legal status of any debt or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

* * *

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

* * *

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

* * *

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* * *

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

* * *

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§ 1692g. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a)

of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

* * *

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* * *

BANKRUPTCY CODE, 11 U.S.C.A.

§ 101 Definitions – In this title

* * *

(8) "Consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose;

* * *

TRUTH IN LENDING ACT, 15 U.S.C.A.

§ 1601. Congressional findings and declaration of purpose

(a) The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

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§ 1602. Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

* * *

(d) The term "person" means a natural person or an organization.

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required; and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. * * *

* * *

(h) The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family or household purposes.

[119 F.3d 477]

Terrence NEWMAN and Michelle Newman,
Plaintiffs-Appellants,

v.

BOEHM, PEARLSTEIN & BRIGHT, LIMITED,
Defendant-Appellee.
David J. RITER and Kathy Riter,
Plaintiffs-Appellants,

v.

MOSS & BLOOMBERG, LIMITED,
Defendant-Appellee.

Nos. 96-2839, 96-2841.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 22, 1997.

Decided July 2, 1997.
Rehearing Denied Sept. 12, 1997.

Carlo G. D'Agostino, Chicago, IL, James Shedden, David J. Philipps (argued), Steven J. Tomiello, Catherine Lee Gemrich, Beeler, Schad & Diamond, Chicago, IL, for Plaintiffs-Appellants in No. 96-2839.

Daniel F. Konicek (argued), Connelly & Schroeder, Geneva, IL, for Defendants-Appellees.

Joanne Faulkner, New Haven, CT, for Amicus Curiae National Association of Consumer Advocates, Inc., National Consumer Law Center, Inc., Consumer Law Center of the South.

Arthur L. Klein, Michael C. Kim, Allan Goldberg, David M. Bendoff, Arnstein & Lehr, Chicago, IL, Thomas J. Hindman, Lauren C. Groh, Orten, Hindman & Jordan, Denver, CO, Stephen M. Marcus, Marcus, Goodman,

Emmer & Brooks, Braintree, MA, for Amicus Curiae Community Associations Institute.

Charles M. Steinberg, Chicago, IL, for Amicus Curiae Near North Association of Condominium Presidents.

James Shedden, David J. Philipps (argued), Catherine Lee Gemrich, Michael S. Hilicki, Beeler, Schad & Diamond, Chicago, IL, for Plaintiffs-Appellants in No. 96-2841.

Before CUDAHY, ROVNER, and EVANS, Circuit Judges.

ILANA DIAMOND ROVNER, Circuit Judge.

The question presented by these appeals, one of first impression in the circuits, is whether an assessment owed to a homeowners or condominium association qualifies as a "debt" under the Fair Debt Collection Practices Act (the "FDCPA" or "Act"), 15 U.S.C. §§ 1692 *et seq.* Guided by our recent decision in *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir.1997), which interprets the term "debt" under that Act, we hold that it does. We therefore reverse the district court's contrary judgment and remand for further proceedings.

I.

In August 1995, Terrence and Michelle Newman received a collection letter from defendant Boehm, Pearlstein & Bright, Ltd., which the law firm sent on behalf of the Board of Directors of the Bridlewood Village Condominium Association. The letter informed the Newmans that they were in default on their obligation to pay a "proportionate share of the common expenses" due the

association as required by the condominium ownership declaration and the association's by-laws. The amount due, according to the letter, was $421.31, which included past-due assessments, late fees, interest, and attorney's fees. The letter stated that if the amount demanded was not paid within thirty days, the association would commence proceedings to obtain possession of the Newmans' condominium unit.

Approximately one month later, David and Kathy Riter received a similar letter from Moss & Bloomberg, Ltd., a law firm representing the Greenbrook Tanglewood Homeowners Association. This letter indicated that the Riters owed $443.60 to the association and that a certified check in that amount should be sent within ten days. Barring that, the letter warned, Moss & Bloomberg would proceed with a "30-day Notice Demand for Possession" unless it was notified in writing that the Riters were disputing the amount owed.

After receiving these letters, the Newmans and Riters filed separate actions under the FDCPA, alleging that the defendant law firms had failed to comply with that statute's requirements. Both the Newmans and Riters specifically alleged that defendants had violated 15 U.S.C. § 1692g by failing to include in their collection letters the validation notice required by that section. *See Avila v. Rubin,* 84 F.3d 222, 226 (7th Cir.1996) (discussing validation notice requirement). Both couples also alleged violations of section 1692e(11) in that the letters they received did not expressly disclose that defendants were attempting to collect a debt and that any information obtained would be used for that purpose. The Newmans further alleged that Boehm, Pearlstein had violated section 1692e

in one additional way – by falsely implying that legal proceedings on the alleged debt had already been initiated. The Newmans and Riters each sought statutory damages, costs, and attorney's fees in accordance with 15 U.S.C. § 1692k(a). Finally, both couples asked the district court to certify a class comprised of all individuals who had received similar letters from the defendant law firms and to appoint plaintiffs as class representatives. They also asked the court to appoint their attorneys (both couples were represented by the same counsel) as class counsel.

Moss & Bloomberg moved to dismiss the Riters' complaint for lack of subject matter jurisdiction, arguing that the past-due assessments referenced in its collection letter did not qualify as a "debt" under the Act. *See* 15 U.S.C. § 1692a(5) (defining a "debt" covered by the FDCPA). The district court granted the law firm's motion, holding that the assessments at issue were not encompassed by the statutory definition of a "debt." *Riter v. Moss & Bloomberg, Ltd.*, 932 F.Supp. 210 (N.D.Ill.1996). In reaching that conclusion, the court noted that a number of courts had construed the term "debt" in the Act as requiring an offer or extension of credit to a consumer. *Id.* at 211 (citing, *inter alia, Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1168-69 (3d Cir.1987)). The district court observed that based upon that interpretation of the Act, the lower courts had uniformly held that an assessment owed to a homeowners or condominium association did not qualify as a "debt" because it did not satisfy the "credit" requirement. *Id.* at 211-12. Although it described the Riters' contrary argument as "not entirely unsound," the district court refused to buck the trend that was developing in

the lower courts. *Id.* at 212. It therefore dismissed the Riters' complaint for lack of subject matter jurisdiction.

After issuing its decision in *Riter*, the district court granted Boehm, Pearlstein's motion to reassign the Newmans' case to it under the court's local rule. The district court then dismissed the Newmans' complaint sua sponte under *Riter*. The Newmans and Riters appealed separately to this court, and we consolidated their appeals for oral argument and disposition.

II.

The FDCPA defines a "debt" in the following way:

> The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5). The bulk of the briefing in these appeals is addressed to whether this definition requires that there be an offer or extension of credit, and thus some type of deferred payment obligation, as the Third Circuit determined in *Zimmerman*. *See* 834 F.2d at 1168-69. The district court followed *Zimmerman* and the weight of lower court authority in concluding that it did. *Riter*, 932 F.Supp. at 212. From that premise, the court reasoned that the Riters' obligation to pay past-due assessments to their homeowners association did not involve an offer or extension of credit, or a deferred payment obligation. *Id.*

But after we heard argument in these appeals, another panel of this court expressly rejected *Zimmerman's* "credit" requirement and held that "an offer or extension of credit is not required for a payment obligation to constitute a 'debt' under the FDCPA." *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1326 (7th Cir.1997). All that is required under *Bass* is a transaction creating an obligation to pay. *Id.* at 1325. Based upon that understanding, the *Bass* panel concluded that the payment obligation arising from a dishonored check qualifies as a "debt" under the Act. *Id.*;[1] *see also Ryan v. Wexler & Wexler*, 113 F.3d 91 (7th Cir.1997) (following *Bass*).

To our knowledge, no federal court has yet concluded that the obligation to pay a condominium assessment constitutes a "debt" under the FDCPA. Yet the few courts to have considered that question have all employed *Zimmerman's* interpretation of that statutory term. *See Riter*, 932 F.Supp. at 211-12; *Vosatka v. Wolin-Levin, Inc.*, No. 94 C 4129, 1995 WL 443950, *7-9 (N.D.Ill. July 21, 1995); *Azar v. Hayter*, 874 F.Supp. 1314, 1318-19 (N.D.Fla.1995), *aff'd. without op.*, 66 F.3d 342 (11th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 712, 133 L.Ed.2d 666 (1996); *Archer v. Beasley*, Civ. No. 90-2576(CSF), 1991 WL 34889, *6 (D.N.J. Mar. 5, 1991). Having rejected *Zimmerman's* "credit" requirement in *Bass*, we now write on a clean slate.

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[1] Because it rejected *Zimmerman's* "credit" requirement, the *Bass* panel circulated its opinion to the active judges of the circuit in accordance with Circuit Rule 40(e). No judge favored a rehearing en banc. *See Bass*, 111 F.3d at 1330 n. 14.

The Riters and Newmans assert that their obligation to pay past-due assessments qualifies as a "debt" because the obligation arose from the purchase of the underlying property units. According to plaintiffs, the purchase of their homes is the "transaction" to which section 1692a(5) refers even if the precise amount and timing of future assessments had not yet been determined. Defendants disagree, of course, but they do so by resorting to the now-discredited "credit" requirement. They assert that because an assessment generally is paid by unit owners before any goods or services are provided by the association, there is no transaction involving an extension of credit or deferred payment. Yet because *Bass* holds that no extension of credit or deferred payment is required, defendants' argument must fail.

By paying the purchase price and accepting title to their home, the Riters became bound by the Declaration of Covenants, Conditions, and Restrictions of their homeowners association, which required the payment of regular and special assessments imposed by the association. The Newmans similarly became obligated upon the purchase of their condominium unit to pay any assessments pursuant to the condominium ownership declaration and the by-laws of their association, as well as under an Illinois statute addressed to condominium property. *See* 765 ILCS 605/9. It is therefore clear that the obligation to pay in these circumstances arose in connection with the purchase of the homes themselves, even if the timing and amount of particular assessments was yet to be determined. *Cf. In re Rosteck*, 899 F.2d 694, 696 (7th Cir.1990) (obligation to pay condominium assessments arose upon purchase of unit, thereby satisfying Bankruptcy Code's

definition of "debt"). Because the statute's definition of a "debt" focuses on the transaction creating the obligation to pay (*Bass*, 111 F.3d at 1325), it would seem to make little difference under that definition that unit owners generally are required to pay their assessments first, before any goods or services are provided by the association. That would only be important if the statute required a credit obligation, which *Bass* says it does not. 111 F.3d at 1326. Regardless of whether the assessment or the service comes first, the obligation to pay is derived from the purchase transaction itself. The assessments at issue in this case therefore qualify as "obligation[s] of a consumer to pay money arising out of a transaction." 15 U.S.C. § 1692a(5).

Not all such obligations are "debts" under the Act, however, for "the money, property, insurance, or services which are the subject of the transaction" must primarily be "for personal, family, or household purposes." *Id.* We have concluded that the relevant transactions in these cases were the purchase of the family homes, and on that general level, there can be little doubt that the subject of those transactions had a personal, family, or household purpose. More specifically, however, we also believe that the assessments themselves satisfy that statutory requirement. To the extent that the assessments were to be used to improve or maintain commonly-owned areas, that purpose, too, qualifies as "personal, family, or household." In our view, when a special assessment is used to repair a common roof, or a monthly assessment is used to pay for services like snow removal from a common walkway or landscaping of a common yard, the assessments are for a household purpose even if more than a single household

benefits. We thus are unable to agree with defendants' suggestion that because all unit owners benefit, assessments like these can be likened to past-due tax obligations, which are not considered "debts" under the Act because they generally are used for communal rather than personal, family, or household purposes. *See Staub v. Harris*, 626 F.2d 275, 278 (3d Cir.1980) (taxes are used for more general purposes than the statute requires, as they provide funds for "prisons, roads, defense, courts and other governmental services"); *see also* Federal Trade Commission – Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50097, 50102 (1988) (unpaid taxes not "debts" under the Act).[2] The assessments here have a more specific household purpose than taxes collected by a governmental entity. Rather than generally providing for government services, these assessments are collected in order to improve and maintain commonly-owned areas used by each unit owner. The assessments thereby directly benefit each household in the development. As a result, the assessments have a "personal, family, or household purpose." *See Archer*, Civ. No. 90-2576(CSF),

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[2] This FTC policy statement is not entitled to conclusive weight in the courts (*see Heintz v. Jenkins*, 514 U.S. 291, 296-99, 115 S.Ct. 1489, 1492-93, 131 L.Ed.2d 395 (1995)), as it reflects only the current enforcement position of the Commission's staff, which is not binding on the Commission itself. *See* Policy Statement, 53 Fed.Reg. at 50101. In cases interpreting the FDCPA, however, we take note of the staff's position and accord it due weight. *Bass*, 111 F.3d at 1327 n. 8. In that regard, we note here that the staff believes that past-due condominium assessments qualify as "debts" under section 1692a(5). *See* Policy Statement, 53 Fed.Reg. at 50102.

1991 WL 34889, at *4-5 (rejecting argument that condominium assessments can be likened to local taxes).

III.

Because the past-due assessments owed by the Newmans to their condominium association and by the Riters to their homeowners association qualify as "debts" under the FDCPA, the district court had subject matter jurisdiction to adjudicate plaintiffs' claims. *See* 15 U.S.C. § 1692k(d).[3] For this reason, we reverse the district court's judgment in each case and remand for further proceedings.

REVERSED AND REMANDED.

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[3] We note, finally, that the defendant law firms have not asserted that they are not "debt collectors" under the Act. The FDCPA applies only to the debt collection activities of a third party who is collecting a debt owed to another, as plaintiffs allege the defendant law firms were doing here. *See* 15 U.S.C. § 1692a(6). As a result, the Act would not also apply to the activities of a homeowners or condominium association in collecting a debt on its own behalf. *See* 15 U.S.C. § 1692a(6)(A) (term "debt collector" does not include "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor").

[969 F.Supp. 604]

Jarrett E. THIES and Jacquelyn D. Thies, Plaintiffs,

v.

The LAW OFFICES OF WILLIAM A. WYMAN and Champs/The Kelly Group, Defendants.

No. CIVIL 97-0734 B (CGA).

United States District Court, S.D. California.

July 23, 1997.

Michael Ernest Doukas and Harold M. Hewell, San Diego, CA, for plaintiffs.

Eric D. Morton, Carlsbad, CA, for defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

BREWSTER, District Judge.

On May 16, 1997, Defendants filed a motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). Plaintiffs are represented by Michael Ernest Doukas and Harold M. Hewell. Defendants are represented by Eric D. Morton. After careful consideration of the moving and opposing papers and for the reasons discussed in detail below, the Court hereby DENIES Defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6).

I. Case Type and Jurisdiction

Plaintiffs Jarrett E. Thies and Jacquelyn D. Thies bring this action under the Fair Debt Collection Practices

Act, 15 U.S.C. § 1692, et seq. ("FDCPA") seeking damages and other relief. Plaintiffs allege that Defendants, The Law Offices of William A. Wyman ("Wyman") and Champs/The Kelly Group ("Kelly"), violated the FDCPA while attempting to collect past-due homeowners association fees plus costs and attorney fees from Plaintiffs. Defendants move for a Rule 12(b)(6) dismissal on grounds that Plaintiffs fail to state a claim upon which relief can be granted. More specifically, Defendants claim that Plaintiffs do not owe a "debt" as statutorily defined by FDCPA and cannot seek relief pursuant to this statute. Jurisdiction is proper under 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d).

II. Background

Plaintiffs own a house within the View Terrace Development in Escondido and are members of a homeowners association, the View Terrace Association ("Association"). The Association improves and maintains common areas within the development. In or about June 1996, Plaintiffs noticed that a common area adjacent to their home was in disrepair. Plaintiffs were unsuccessful in their attempts to have the Association maintain or repair the area. Based on the Association's failure to respond to their requests, Plaintiffs withheld their homeowner association fees for two months.

In August 1996, Plaintiffs resumed payment to the Association in care of Defendant Kelly and mailed a check for the past-due fees including late fees ($176.00) in mid-September. Soon after, Plaintiffs received a letter from Defendant Wyman which notified Plaintiffs that

they owed $186.00 plus $30.00 in attorney fees. The letter also threatened recordation of a lien against Plaintiffs' property for the amount owed. In October 1996, Plaintiffs sent a check for their monthly dues plus late charges ($88.00); Defendant Wyman returned their September check of $176.00 because it did not represent the entire amount due. Plaintiffs continued to send checks for payments and late fees non-inclusive of attorney fees, and Defendant Wyman continued to return the checks through March 1997. Defendants filed a claim against Plaintiffs, and on March 11, 1997, a Municipal Court of the County of San Diego entered default judgment against the Plaintiffs in the amount of $1314.88.

III. Discussion

A. Standard of Law

Under Rule 12(b)(6), a defendant may seek to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). In making this determination, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See Usher v. Los Angeles*, 828 F.2d 556, 561 (9th Cir.1987).

B. Plaintiffs' Cause of Action

The issue contained within this motion is whether or not homeowners association fees fall within the statutory definition of "debt" for the purposes of the FDCPA. A "debt" as defined by the FDCPA is (1) an obligation or alleged obligation of a consumer to pay money (2) arising

out of a transaction in which (3) the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes. *See* 15 U.S.C. § 1692a(5). Such an obligation does not need to be reduced to a judgment in order to fall under the protection of the FDCPA. *See id.*

A consumer for the purposes of this statute is "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3). Plaintiffs are consumers within the purview of the statute as they are natural people and are obligated to pay their homeowners association fees because of a covenant that runs with their property.

1. What Is A Transaction?

There is considerable confusion and conflict in the federal courts as to what a "transaction" is for the purposes of this statute. The statute requires in part that a "debt" encompass an obligation to pay that arises out of "a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5). The Ninth Circuit recently addressed the meaning of transaction within the FDCPA's definition of "debt." It held that the FDCPA is not limited to debts arising out of the offer or extension of credit. *See Charles v. Lundgren & Associates, P.C.*, 119 F.3d 739, ___, No. 96-15995, 1997 WL 370884, at *3, (9th Cir. July 8, 1997) (holding that a dishonored check used to pay for restaurant meal creates a "debt" under the FDCPA). In its

opinion, the Ninth Circuit adopted in whole the reasoning of the Seventh Circuit in *Bass v. Stolper, Koritzinsky, Brewster, & Neider, S.C.*, 111 F.3d 1322 (7th Cir.1997).

In *Bass*, the Seventh Circuit interpreted the meaning of "transaction" under the FDCPA. It held that an offer or extension of credit was not required to constitute a debt for the purposes of the statute; the obligation to pay on a transaction, such as a dishonored check, created a debt. *See Bass*, 111 F.3d at 1326. The Seventh Circuit reasoned that the plain meaning of the statute, the congressional intent, and the legislative history supported a broad interpretation of "transaction." *See id.* Citing the legislative history of the FDCPA to support its position, the Seventh Circuit stated that "[e]arly versions of the Act clearly included a credit extension requirement in defining 'debt'. . . . We find it persuasive the fact that [the term 'credit'] was deleted from later drafts, and no reference to 'credit' was ever re-inserted in the definition." *Id.* at 1327. The court also cited a House Report stating the drafters' intent that "the term 'debt' include consumer obligations paid by check or other non-credit consumer obligations." *Id.* at 1327 (quoting H.R.Rep. No. 95-131, 95th Cong., 1st Sess. 4 (March 29, 1977)). Furthermore, as the court pointed out, it is prohibited from "reading into clear statutory language a restriction that Congress itself did not include." *Id.* at 1326 (citing *Hubbard v. United States*, 514 U.S. 695, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995)).

In contrast to the Seventh and Ninth Circuits, the Third Circuit construed "transaction" as requiring an offer or extension of credit. In dicta, it held that a debt under FDCPA is "a transaction in which a consumer is offered or extended the right to acquire 'money, property,

insurance, or services' which are 'primarily for household purposes' and to defer payment." *Zimmerman v. H.B.O. Affiliate Group*, 834 F.2d 1163 (3rd Cir.1987) (holding that tort liability to pay for pirated cable signal is not consumer debt) (quoting 15 U.S.C. § 1692a(5)).

In addition to being bound by the Ninth Circuit precedent in *Charles*, the Court finds the Seventh Circuit's reasoning, which the Ninth Circuit adopted in whole, more persuasive than the Third Circuit's reasoning. The legislative history reflects Congress' intent that the FDCPA apply to all kinds of consumer transactions, not just credit transactions. Following this intent, the Ninth and Seventh Circuits construed "transaction" generally without the additional requirement of an extension or offer of credit.

Plaintiffs are obligated to pay their homeowner fees because of a covenant running with their property. Because no offer or extension of credit is required, the Court finds that a transaction, for the purposes of the FDCPA, arises out of Plaintiffs' obligation to pay dues for the services of the Association.

2. Primarily for Personal, Family or Household Purposes

Having established that Plaintiffs' obligation to pay money for services is a transaction, the Court addresses whether the "money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5). The subject of the transaction is the services

Plaintiffs receive from the fees that they pay to the Association. The only question that remains is whether or not such association fees are primarily for personal, family, or household purposes.

Only once has the Ninth Circuit interpreted the meaning of the clause "primarily for personal, family, or household purposes." It concluded that a personal loan for business purposes did not conform to this qualification and did not constitute a debt under the FDCPA. *See Bloom v. I.C. System, Inc.*, 972 F.2d 1067, 1068 (9th Cir.1992) (holding that, personal loan used for venture capital in a software company is not primarily for personal, family, or household purposes). This precedent, however, is not particularly instructive for the purposes of the instant case.

Defendants cite district court cases from other circuits that decline to construe homeowner/condominiun association fees as a "debt" under the FDCPA. A district court in Virginia found that an assessment by the subdivision for maintenance of a private road was not "primarily for personal, family, or household [purposes]." *Nance v. Petty, Livingston, Dawson & Devening*, 881 F.Supp. 223, 225 (W.D.Va.1994) (citing 15 U.S.C. § 1692a(5)). A district court in Florida reasoned that condominium fees were not consumer debt since "[t]here [was] no evidence of a pro tanto exchange." *Azar v. Hayter*, 874 F.Supp. 1314, 1318 (N.D.Fla.), *aff'd*, 66 F.3d 342 (11th Cir.1995). The *Azar* court likened the condominium fees in its case to the per capita tax in *Staub v. Harris*, 626 F.2d 275, 278 (3rd Cir.1980). In *Staub*, the court found that taxes "primarily finance governmental functions, such as schools, police and fire protection, which secondarily may benefit an

individual resident or household" and therefore do not constitute a "debt" under the FDCPA. *Staub*, 626 F.2d at 277-78 (quoting lower court decision).

Defendants also cite an Illinois district court case which held that condominium fees were not "debt" because they "operate to provide communal goods and services which only indirectly benefit the payer." *Riter v. Moss & Bloomberg, Ltd.*, 932 F.Supp. 210, 211 (N.D.Ill.1996). Recently, however, *Riter* was overturned by the Seventh Circuit in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir.1997) (holding that past-due condominium fees are a debt under the FDCPA). In *Newman*, the Seventh Circuit held that "assessments . . . used to improve or maintain commonly-owned areas . . . qualifies as 'personal, family, or household.' " *Newman*, 1997 WL 375341 at *4, 119 F.3d at ___. In finding that taxes are not like condominium fees, the Seventh Circuit stated, "Rather than providing for government services, these [condominium] assessments are collected in order to improve and maintain commonly-owned areas used by each unit owner. The assessments thereby directly benefit each household in the development." *Id.*

The Court finds that the arguments from cases cited by Defendants unduly narrow the application of the FDCPA. The FDCPA has no requirement that a service "directly" benefit the consumer, as the *Riter* court concluded, nor does the plain language of the FDCPA require a "pro tanto exchange" as the court in *Azar* did. The Court declines to follow these unwarranted restrictions, and applies the reasoning in *Newman* to homeowner association fees. The Court finds that homeowner association fees for maintenance and improvement of common areas

within a housing development are a service primarily for personal, family, and household purposes.

The fact that many households may use or benefit from a common area does not logically diminish the "primary" nature of the service. For example, if a consumer failed to pay his membership dues to a health club, there would be no question that this would create a "debt" under the FDCPA because the obligation to pay for the services rendered would be primarily for his personal purposes. The debt to the health club would be no different merely because other members also used the services of the club, nor would the debt change if the consumer never used the services of the health club but was still under contract to pay dues. A homeowners association is akin to a health club or other exclusive group. A homeowner, by purchasing the property, is under a contractual agreement to be a "member of the club." With the payment of dues come the services provided by the Association – use of the common areas improved and maintained with the dues. If the association maintains a swimming pool or tennis courts, they are services available for the exclusive use of the members. The purpose of these services do not become "secondary" or "indirect" merely because other members may also use them.

The maintenance and improvement of common areas also serve a "personal, family, or household purpose" as required by the FDCPA. Many times association fees are applied to such purposes as painting the outside of or re-roofing common buildings. In the instant case, the Association maintained and improved common areas in the development. Plaintiffs, in purchasing their property,

believed that the Association would maintain the common area adjoining their property and that they would not be responsible for its upkeep. Similarly, they knew that other common areas located within the development, such as parks, gardens, and swimming pools, would continue to be maintained. The upkeep of such common areas serves the purpose of preserving the aesthetic nature of the housing development for the use and enjoyment of each association member. Because anyone living within the development may use or enjoy these services, the Association's maintenance and improvement of common areas can be utilized by a single person, members of a family, or members of a household. Thus, these services may have a personal, family, or household purpose depending upon the person or people that use it. In the instant case, the Court finds that the services funded by homeowner association fees serve all three purposes and that Plaintiffs do have a "debt" under the FDCPA. Accordingly, the Court DENIES Defendants' motion to dismiss.

IV. Conclusion

Plaintiffs are consumers that have an obligation to pay money to the Association. Because this obligation arises out of a "transaction" which is "primarily for personal, family, or household purposes," Plaintiffs owe a "debt" within the definition of the FDCPA. As such, the Court finds that the Plaintiffs have stated a claim under the FDCPA. The Court therefore DENIES Defendants' motion to dismiss under Fed.R.Civ.P. 12(b)(6).

IT IS SO ORDERED.